Supreme Court, U.S.
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In the Supreme Court of the United States

WILMORE GREEN, III and MARSHA W. GREEN,

Petitioners,

v.

LEVIS MOTORS, INC., doing business as Levis Mitsubishi; JOHN DOES, 1-10; HANCOCK BANK OF LOUISIANA; ABC INSURANCE; XYZ INSURANCE CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If an assignee of a retail installment contract has knowledge that allows it to determine that there is a misrepresentation on a Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") disclosure statement, is that misrepresentation apparent on the face of the document to the assignee?

2. If the TILA disclosure statement misrepresents the amount paid to the State of Louisiana for license fees and the assignee could determine the existence of the misrepresentation from license fee tables provided to it by the state, is the misrepresentation apparent on the face of the document to the assignee?

3. Does the TILA §1641 partially abrogate a provision found in every retail installment contract, solely because the contractual provision is required to be included in retail installment contracts by FTC regulation?

4. Does the TILA §1641 partially abrogate a provision found in every retail installment contract, even though TILA §1610(d) specifically provides that the Act does "not affect the validity or enforceability of any contract"?

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PREVIOUS OPINIONS

The citations of the official reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed and remanded in part the decision of the United States District Court for the Middle District of Louisiana. *Green v. Levis Motors, Inc.*, 179 F.3d 286 (5th Cir. 1999).

The United States District Court for the Middle District of Louisiana granted respondent Levis Motors, Inc.'s and respondent Hancock Bank of Louisiana's motions for summary judgment. *Green v. Levis Motors, Inc.*, 994 F. Supp. 735 (M.D. La. 1997) (incorporating "Ruling on Motion for Summary Judgment Filed By Chrysler Financial Corp.," *Turner v. II Diamond Motors*, No. 96-336-B-M1 (M.D. La. July 14, 1997)).

STATEMENT OF JURISDICTION

The Fifth Circuit affirmed the decision of the District court for the Middle District of Louisiana granting summary judgment in favor of respondent Hancock Bank of Louisiana ("Hancock") in *Green v. Levis Motors, Inc.*, 96-508-A-M1, on June 22, 1999. *Green v. Levis Motors, Inc.*, 179 F.3d 286 (5th Cir. 1999). The Fifth Circuit also reversed and remanded the decision of the District Court granting summary judgment in favor of Levis Motors, Inc. ("Levis Motors"). Petitioners now timely seek a writ of certiorari solely with regard to the decision affirming summary judgment to Hancock. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

The Truth in Lending Act

15 U.S.C. § 1641: Liability of Assignees.

> (a) Prerequisites. Except as otherwise specifically provided in this title, any civil action for a violation of this title or proceeding under section 1607 of this title may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. §1610(d): Contract or other obligations under State or Federal law.

> Except as specified in sections 125, 130, and 166 [15 U.S.C. §§ 1635, 1640, and 1666e], this title [15 U.S.C. §§ 1601 et seq.] and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

16 C.F.R. §433.2: Preservation of consumers' claims and defenses, unfair or deceptive, unfair or deceptive acts or practices.

> In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice

within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> **NOTICE**
>
> **ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

STATEMENT OF THE CASE

On August 31, 1995, the Greens purchased a 1994 Mitsubishi Gallant automobile from Levis Motors pursuant to a motor vehicle retail installment contract ("RIC"). (R.Doc. 1, ¶ 14-16, Exhibit A). Levis Motors assigned the entire RIC, which contained the TILA violation, to Hancock. (R.Doc. 1, ¶ 17). The RIC contained the following provision:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

As part of their automobile purchase, the Greens paid Levis Motors for the license fee imposed by the state of Louisiana in connection with the transaction. Levis Motors charged the Greens $40 for the fee. The "Itemization of Amount Financed" portion of the Greens' TILA disclosure, provided by Levis Motors, represented that the entire $40 was an "Amount Paid to Public Officials For:" a "License Fee." (R.Doc. 1, Exhibit A). Levis Motors' representations were as follows:

Itemization of Amount Financed

* * *

(5) Amount Paid to **Public Officials** For:

(c) License Fee ..... $ 40.00

(R.Doc. 1, Exhibit A) (emphasis added).

Levis Motors did not in fact pay $40 to the state of Louisiana for the license fee. (R.Doc. 1, ¶ 20, Exhibit B). Levis Motors only paid the required $22 to the state of Louisiana, retaining the additional $18 as profit. (R.Doc. 1, ¶ 21). The misrepresentation that the full amount of a charge has been paid to a third party, when a portion has been retained by the dealer (the retained amount is known as an upcharge), has been uniformly held to violate the TILA. *See Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283 (7th Cir. 1997) (holding that consumers state a claim under TILA when they charged automobile dealers failed to disclose retention of portion of warranty charge reported as "Amounts Paid to Others on Your Behalf"); *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998). The Fifth Circuit accordingly held the misrepresentation of the upcharge in this

case was a TILA violation and reversed the summary judgment in favor of the dealer.

However, the Fifth Circuit affirmed the district court's grant of summary judgment to Hancock as assignee. The Fifth Circuit held that Hancock could not be directly liable for the violation because TILA §1641 limits direct assignee liability to violations that are "apparent on the face of the disclosure statement." The Fifth Circuit found that it was not apparent on the face of the document even if Hancock (1) knew that the disclosure was false and (2) had ready access to official Louisiana license fee tables, which set the amount of the fee.

The Fifth Circuit also held that Hancock could not be secondarily liable under the provision in the contract assigned to it that allows the Greens to bring any claim that they had against Levis Mitsubishi, the dealer, also against Hancock. Although the Fifth Circuit established that the Greens had a claim against the dealer, it abrogated the preservation of claims provision in the RIC because it was required by an FTC regulation and was inconsistent with TILA §1641. The Fifth Circuit reached this result even though it acknowledged that TILA §1610(d) provides that the TILA does not effect the validity or enforceability of any contract. The Fifth Circuit noted "that the FTC's regulations do not neatly complement the TILA in this case" but found that not enforcing the contract was "choosing the lesser of two imperfect options."

This petition involves only the issues regarding Hancock's liability for the disclosure violations contained in the contract.

REASONS FOR GRANTING THE WRIT

The questions presented in this case affect every consumer who purchases a car, furniture or large appliance pursuant to a retail installment contract that is assigned by the retailer to a bank or finance company. Millions of such contracts are entered into every year.

The issues presented here are extremely important. The Court of Appeals limited the reach of the Truth in Lending Act, which is designed to protect buyers' rights, by applying an interpretation that restricts consumer rights, contrary to the decisions of this Court in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), and *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

The TILA statement prepared by the dealer/creditor contained a misrepresentation as to the amount paid to the state for license fees. As a result of this misrepresentation, the Greens paid more than they should have for license fees and they also paid additional finance charges to the assignee, Hancock Bank.

The TILA restricts assignee liability for violations of the Act to those disclosures "which can be *determined* to be incomplete or inaccurate *from* the face of the disclosure document." 15 U.S.C. §1641. The Fifth Circuit held that only the disclosure statement could be considered in determining assignee liability. Thus, if an assignee, such as Hancock, actually knows that a disclosure is inaccurate or could determine the inaccuracy by reference to readily accessible state published license fee tables, the assignee is still not liable for the misrepresentation, even though it directly benefits from the misrepresentation.

The Fifth Circuit decision also held that the consumer cannot rely on the clear language in the contract he or she signed by holding that the TILA abrogates the only clause in the RIC that benefits the consumer. The Fifth Circuit reached this decision even though TILA §1610(d) specifically provides that the TILA does not affect the validity or enforceability of any contract.

Further, the Fifth Circuit nullified the preservation of claims clause in the contract as to TILA claims on the ground that the clause is required by an FTC regulation. In enacting the regulation, the FTC recognized that (1) fraud in consumer transactions is most likely to be committed by the dealer or seller and (2) the finance company is in the best position to police the activities of the dealers because it controls the money. To achieve these salutary objectives, the FTC required a simple contract provision that could be readily understood by most consumers. *See* Final Rule, 40 Fed. Reg. 53,506, 53,526 (Nov. 18, 1975).

The FTC regulation, with the resulting uniform preservation of claims contract provision, had been in effect for several years before Congress amended the assignee liability provisions in the TILA. Although Congress specifically listed all of the provisions in the TILA that did affect the enforceability of contracts, it did not include §1641(a). Despite Congressional refusal to take specific action, the Fifth Circuit held that Congress impliedly nullified part of the FTC action.

This Court should review the decision of the Fifth Circuit because it involves issues of major importance to the consumer commerce of nation, including unduly restricting the interpretation of the TILA, one of the most im-

portant consumer protection statutes, and abrogating a provision in retail installment contracts that benefits the consumer.

I. THE VIOLATION WAS APPARENT ON THE FACE OF THE DISCLOSURE STATEMENT TO HANCOCK.

Hancock is in the business of financing the sale of automobiles by purchase of RICs and direct loans. In the course of this business Hancock takes security interests in the automobiles it finances. A security interest was taken in the Greens' automobile. As the secured lender Hancock has a direct interest in having the vehicles properly licensed, which requires that the proper fee be paid. Thus, Hancock monitors licensing of cars in which it has security interests and knew that the license fee for the Greens car was $22.

On the face of the TILA disclosure statement, the dealer said that $40 was paid to the state for the license fee. Hancock, by looking at the disclosure statement, knew it contained a misrepresentation.

The Fifth Circuit found Hancock's subjective, but actual, knowledge irrelevant to the issue of whether the misrepresentation is apparent on the face of the document. The Circuit accepted the district court's holding that "1641(a) establishes an objective test to determine the liability of assignees." *Green*, 179 F.3d at *25. The Circuit held that the misrepresentation must be apparent to the mythological "reasonable" person.

Of course, the misrepresentation is not apparent to most people. The Greens were unaware of the fraud until

they consulted an attorney. Obviously the fraud works on almost all car buyers, most of whom are reasonable persons, or Levis would not engage in it.

The Fifth Circuit's holding does not comport with §1641(a) which provides that the assignee may be held liable "if the violation is apparent on the face of the disclosure statement. . . . For purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be *determined* to be incomplete or inaccurate *from* the face of the disclosure document or other documents assigned." 15 U.S.C. §1641(a) (emphasis added).

The Congressional definition is concerned with a disclosure that can be *determined* from the face to be inaccurate. "Determine" is a verb, an action word. Congress required a thought process, an analysis of what is on the contract, a considered determination—not just a passive reading. Under an objective, passive reading by the proverbial reasonable person, knowledge cannot be presupposed. Under the terms of the statute, however, whether the assignee can determine a violation, of necessity requires that the assignee use the knowledge that it actually has.

Thus, the assignee cannot just look at the contract, but must think about and apply his knowledge to the disclosures. As the Seventh Circuit stated in *Taylor v. Quality Hyundai*, 150 F.3d 689 (7th Cir. 1998), "we do not assume that assignees approach their tasks with blank minds." *Taylor*, 150 F.3d at 694. The misrepresentation was apparent on the face of the document to Hancock. The Fifth Circuit erred in holding otherwise.

Further, the license fees are standard fees set by the State, which can readily be calculated from public tables, published and distributed by the State. Hancock had, or should have had, these tables as a part of its business. Assignees have notice of the license fee statutes in their states. *See N.A.D.A. Quick Reference Fact Sheet, in N.A.D.A. Title and Registration Text Book, Summary of Procedures, Regulations and Fees for All 50 States and D.C.* (1999). Thus, by at most consulting the fee schedule, Hancock knew that the amount paid to the state for license fees had been misrepresented.

The Fifth Circuit held that Hancock was not liable for violations consisting of upcharges on state licensing fees if it had to look beyond the disclosure documents to state law as to whether there is a violation. The Court of Appeals held there was no duty of further inquiry. However, this is not an inquiry as to private dealing. It is knowledge of state law.

Thus, under the Fifth Circuit decision, assignees may claim ignorance of the law as a defense. This conclusion is inconsistent with the venerable principle that ignorance of the law will not excuse. *Cheek v. United States*, 498 U.S. 192. 199-200 (1991); *Barlow v. United States*, 32 U.S. 404, 411 (1833) (Story, J.) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally").

Furthermore, the presumption is not a fiction in this case. Registration and licensing laws are common. *Lambert v. California*, 355 U.S. 225, 228 (1957). They pertain to the regulation of business activities. *Id.* In order to conduct its consumer finance business Hancock must necessarily be aware of these laws. Hancock has every

interest in having the vehicles it uses as collateral properly titled and licensed. This is not a situation where a person is being punished for innocent passivity.

As this Court said in *Shevlin-Carpenter*, "'[t]he legislature may enjoin, permit, forbid and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases.' In other words, innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse. The law in controversy has no ex post facto element or effect in it. It was existing law when the[ ]error was committed. . . . There is no element of deception or surprise in the law." *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68-69 (1910) (construing a violation of timber-cutting permit) (quoting *Calder v. Bull*, 3 Dall. 386 (Chase, J.)).

To afford notice, a legislature "need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc. v. Short*, 454 U.S. 516, 531-32 (1982). Louisiana has done this and Hancock cannot claim ignorance.

The fact that this case involves the misrepresentation of the amount paid for a statutorily set license fee rather than a privately negotiated extended warranty, distinguishes this case from the Seventh Circuit opinion in *Taylor v. Quality Hyundai*, 150 F.3d 689 (7th Cir. 1998) and the Eleventh Circuit opinion in *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998). There the courts held that the assignee could not have knowledge of whether there was an upcharge on a privately sold and purchased extended warranty. Although the dealer may take an upcharge on extended warranties

90% of the time, the finance company employee cannot determine if any particular contract contained an up-charge because the finance company does not know which extended warranty was purchased or the cost of the warranty to the dealer.

That is not the case here. The license fees imposed by the state of Louisiana are not creatures of the free market that are subject to bargaining. They are a set amount imposed by the state on all similar vehicles. As such, Hancock *will* know when the amount disclosed as paid to the state is misrepresented.

The purpose of §1641 is to protect the assignee from being blind-sided. Congress decided not to hold the assignee directly liable for TILA violations that it was not aware of and could not protect itself against.

However, if the assignee, with its knowledge, can determine that there is a misrepresentation in the disclosure statement, then that misrepresentation is apparent on the face of the statement to the assignee and the assignee can and should protect itself. It can refuse to accept the contract. It can and should tell the dealer that it will not buy contracts that contain misrepresentations. On the other hand if it accepts a contract which it knows contains a misrepresentation, it also accepts the risk of TILA liability.

The Fifth Circuit erred in unduly restricting the reach of the TILA, which must be given a liberal construction to protect consumers. *Peyton v. Rowe*, 391 U.S. 54, 64-65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *Fairley v. Turan Foley Imports, Inc.*, 65 F.3d 475, 480 (5th Cir. 1995); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278,

1280 (7th Cir. 1980); *Cody v. Community Loan Corp.*, 606 F.2d 499, 505 (5th Cir. 1979); *N.C. Freed Co., Inc. v. Board of Governor*, 473 F.3d 1210, 1214 (2d Cir. 1973).

II. HANCOCK IS LIABLE UNDER THE PRESERVATION OF CLAIMS CLAUSE IN THE RETAIL INSTALLMENT CONTRACT.

Hancock is also liable because the retail installment contract allows the buyer to bring any claim he or she has against the dealer also against the assignee. The preservation of claims language in the contract, provides:

> **ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.**

No one contests that under the plain meaning of the contractual language, if the debtors have a claim against the dealer it may also be brought against the assignee. Here, there is no question that the Greens have a claim against the seller.

But the Fifth Circuit effectively held that in interpreting the contract you should not just look at the language because it really doesn't mean what it says. The Fifth Circuit writes an unstated exception into the contract language that it does not apply to TILA claims. The Fifth Circuit added this exception to the clear terms of the contract on the grounds that (1) if an assignee cannot be directly liable under the TILA, it cannot be derivatively

liable under the contract and (2) the FTC Regulation was preempted by the amendment to TILA §1641. The Fifth Circuit erred for several reasons.

First, assignee liability is different under TILA and under the preservation of claims clause. Under the TILA, the assignee may be fully liable for all actual and statutory damages. The latter, in a class action, is the lesser of 1% of the assignee's net worth or $500,000. Under the contract the assignee is only liable for what the consumer may claim against the dealer. Thus, statutory damages in a class action would only be 1% of the net worth of the dealer, generally an amount much less than 1% of the net worth of the assignee finance company. Under the contract the assignee's liability is further limited to the amount the consumer has paid on the contract.

Second, parties may contract to assume liabilities they would not be subject to absent the contract. *White Consolidated Industries, Inc. v. Westinghouse Electric Corp.*, 179 F.3d 403, 410 (6th Cir. 1999); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 12 (2d Cir. 1993) (holding that parties could agree to allocate of liability for environmental clean-up costs prior to CERCLA); *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998) (noting exception to general rule that purchaser of assets does not assume liability as well unless expressly or impliedly agrees to do so); *United States v. First Dakota National Bank*, 137 F.3d 1077, 1080 (8th Cir. 1998) (same). By accepting the contract, Hancock agreed to be responsible for the dealer's liability even if it could not be held directly liable.

Third, and most important, the Fifth Circuit's decision is contrary to the TILA. Section 1610(d) provides:

> **Except as specified in sections 1635, 1640, and 1666e[1] of this title, this subchapter and the regulations issued thereunder *do not affect the validity or enforceability of any contract* or obligation under State or *Federal law.***

Section 1641 is *not* one of those referred to as altering contract liability. Thus, the validity and enforceability of the preservation of claims provision is unaffected by §1641. Section 1610 reaffirms the basic contract principle that the parties to a contract are entitled to rely on the terms of the contract.

The Fifth Circuit erred when it held that the FTC required contract language "trumped" the TILA. The most important aspect of the FTC action, is that it required a provision in the contract. It opted for a simple contractual provision in each contract which the FTC stated "we believe will be understood by most consumers." 40 Fed Reg. at 53,526. This is in accord with the teaching in *Fairley v. Turan Foley Imports, Inc.* that "We must examine the transaction through the eyes of the consumer." *Fairley v. Turan Foley Imports, Inc.*, 65 F.3d 475, 480 (5th Cir. 1995) (quoting *Cody v. Community Loan Corp.*, 606 F.2d 499, 505 (5th Cir. 1979) *cert. denied*, 446 U.S. 988 (1980)). This does not conflict with or trump §1641 because §1610 specifically provides that §1641 does not affect the validity or enforceability of any contract.

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[1] 15 U.S.C. §1635 provides for the right of rescission in certain transactions; 15 U.S.C. §1640 provides for civil liability; and, 15 U.S.C. §1666e provides for the return of credit card purchases.

Fourth, the Circuit's holding is not supported by §1641 itself. That section provides that "any civil action for a violation of this subchapter which may be brought against a creditor may be maintained against any assignee of such creditor only if . . . ."

The key phrase is a "civil action for a violation of this subchapter." This means one where the cause of action "arises under" TILA itself, not one based on a contractual agreement to pay for someone else's TILA violation. The distinction is a critical but well-established one. Many private contracts refer to federal statutes or regulations, or adopt them wholesale, but a claim under such a contract—even one based on the "adopted" statutes and regulations—is a state law claim for breach of contract, not one that "arises under" the federal law. *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89 (5th Cir. 1986) (action for breach of private contract that incorporated Natural Gas Act "arose under" state law).

III. THE QUESTION AFFECTS THE RELATIONSHIP BETWEEN BUYERS, CREDITORS & ASSIGNEES UNDER THE TRUTH IN LENDING ACT.

Consumers are increasingly purchasing new and used cars on credit. Jane Bryant Quinn, *Financing a car is easy these days even for "subprime borrowers"*, The Baltimore Sun, Aug. 15, 1996, at 9C; *Market Timing*, N.Y. Times, Aug. 6, 1995, Sec. 3, at 2. Two out of three of all auto loans are for used vehicles. Remar Sutton, *More Used Car Loans, Anyone?*, Credit Union Magazine, July 1998, p. 31. More than 41 million used cars were sold in 1995. *Used car sales to increase to 41.2 million in 1998*,

Aftermarket Business, May 1, 1998, at 1. Used car sales accounted for 73% of all vehicles sold in 1997. *Id.*[2]

Liability for upcharges is an important issue in the industry and has received attention inside and outside of the industry. *See* Consumer Financial Law Report, July 28, 1999; *5th Cir. Interprets Truth in Lending Act in Retail Installment Contract Case*, Bank & Lender Liability Litigation Reporter, July 21, 1999, at 13; Brendan Stephens, *Lenders Defeat Car Buyers' Warranty Claim*, Chicago Daily Law Bulletin, at 1; *Groups Spar Over Reg Z "Upcharge" Rules*, The Credit Union Accountant, February 19, 1996, at 4. The opinion in *Green v. Levis Motors* is likely to be determinative as to a lender's liability for a dealer's upcharges and govern the behavior of all lenders in the future.

One of the main purposes of TILA is to ensure that consumers have adequate information to choose credit wisely. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). In fact, 15 U.S.C. § 1601(a) states that "it is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to com-

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[2] The size of the used car industry is estimated to be $324 billion. Bradford Wernle, *Auto Marketing: Stigma Gone, Used Vehicles Defy the System: Savvy Marketers with Fresh Ideas Stake Claims in MultiBillion-Dollar Segment*, Advertising Age, April 7, 1997, at S2. The used-car market is larger than the new-car market. *See e.g.* Edward Kaufman, *Leasing and Certified Used Cars Impact the Aftermarket*, Automotive Marketing, Aug. 1998, at 4 ("About 41 million used vehicles were sold for total sales of $370 billion [in 1997]. By comparison, about 15 million new vehicles were sold for $303 billion.")

pare more readily the various credit terms available to him and avoid the uninformed use of credit." The Truth in Lending Act is designed to protect the buyer's "right to be informed" of the cost of credit and to give the consumer the facts needed to make an informed choice. 109 Cong. Rec. 2029 (1963) (remarks of Sen. Douglas). At the same time, TILA protects ethical creditors and invigorates competition. *Id.*

One of the cornerstones upon which the TILA is based is that the disclosures must be accurate. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973); *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283 (7th Cir. 1997). The Fifth Circuit has substantially lessened the protection against inaccurate disclosures. It cannot justify this result by an overly restrictive reading of the Act or by choosing what it called the "lesser of two imperfect options."

The dual aspects of the Fifth Circuit's opinion has created an anomalous situation and curious inversion of the standard of knowledge. The sophisticated finance company may take after an ostrich. It may read and take at face value the retail installment contract and the other documents assigned, although because of its experience and knowledge concerning financing, it knows full well that a statement on the contract is false. On the other hand, the typical, reasonable consumer must ignore the unambiguous language of the contract that he or she signed that informs the consumer that he or she can assert "any claim" against the assignee. Instead, they must read into the unambiguous language a limitation of which even a sophisticated consumer would not probably be aware.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed June 22, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30443

WILMORE GREEN, III; MARSHA W. GREEN,
on behalf of themselves and all
others similarly situated,

Plaintiffs-Appellants,

versus

LEVIS MOTORS, INC., ET AL.,

Defendants,

LEVIS MOTORS, INC., doing business as
Levis Mitsubishi; JOHN DOES, 1-10;
HANCOCK BANK OF LOUISIANA; ABC
INSURANCE; XYZ INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana, Baton Rouge

Before KING, Chief Judge, and REYNALDO G. GARZA and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Wilmore and Marsha Green have sued their car dealer and the bank that holds their retail installment contract for a violation of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* The district court granted summary judgment for both Levis Motors, Inc. d/b/a Levis Mitsubishi (the car dealer) and Hancock Bank of Louisiana (the holder of the installment contract). The district court erred in granting summary judgment for Levis Motors, but correctly granted summary judgment for Hancock. We therefore reverse in part, affirm in part and remand for further proceedings.

I

The core facts in this case are not in dispute. On or about August 31, 1995, (and this date is important), Wilmore and Marsha Green purchased a used car from Levis Motors. To finance this purchase, the Greens entered a retail installment contract ("RIC") with Levis Motors. As required by the Truth in Lending Act ("TILA"), the contract disclosed the "amount financed" and, in conjunction with the disclosure of this amount, purported to itemize an amount paid to the state of Louisiana for licensing fees. *See* 15 U.S.C. § 1638(a)(2)(B)(iii) (West 1998). The relevant portion of the contract reads as follows:

Itemization of Amount Financed

(1) Cash Price	$	11,332.34
(2) (a) Cash Downpayment	$	700.00
(b) Net Trade-In Allowance	$	n/a
(3) Unpaid Balance	$	10,632.34

* * *

(5) Amount Paid to Public Officials For:

* * *

(c) License Fee	$	40.00

The issues in this case surround the amount listed as "Paid to Public Officials For License Fee." Although the RIC lists the amount paid to Louisiana as $40, the state only charged $22 for licensing involved with the Greens' car. Levis Motors retained the $18 balance. Apparently, the practice of tacking on dealer charges to amounts paid to third parties is common in the automotive sales industry, and the balance retained is referred to as an "upcharge."

According to Levis Motors, the $40 amount was a standard licensing fee that it applied to the sale of all its cars. In some of the sales, the actual amount charged by Louisiana exceeded the $40 listed, and in others (such as the sale to the Greens) the state charged less than $40. (Louisiana bases its licensing fee on the sale price of the automobile and the length of time the license remains valid.) The Greens have alleged that Levis Motors violated the TILA because of the RIC's inaccuracy in disclosing the amount paid to third parties.

After executing the RIC with the Greens, Levis Motors assigned the contract to Hancock. Another provision of the RIC plays an important role in evaluating the potential liability of Hancock. That provision, which the FTC requires for all consumer credit contracts, *see* 16 C.F.R. § 433.2 (1998), states the following:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND

> DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

(This clause is referred to below as the "FTC clause.") The Greens sued both Levis Motors and Hancock for violating the TILA. The history of the various, relevant regulations and agency interpretations is somewhat complex. Therefore, we first turn to the applicable code law before addressing the district court's reasoning and the parties' arguments.

II

A

The statutory text upon which the Greens base their claim is found in 15 U.S.C. § 1638(a)(2)(B)(iii):

> (a) Required disclosures by creditor
>
> For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:
>
> ***
>
> (2)(B) In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. . . . Upon receiving an affirmative indication, the creditor shall provide, at the

> time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable:
>
> ***
>
> (iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person;

Instead of giving the Greens the option of requesting a written itemization of the amount financed, Levis Motors decided to supply this itemization automatically.[1] An underlying issue in the Greens' case is whether Levis Motors's retention of an upcharge, without notification to the Greens that the upcharge was included in the amount listed as paid to a third party, violates this statutory provision.

At the time the Greens and Levis Motors executed the RIC, the only relevant regulatory provisions offering any guidance were 12 C.F.R. 226.18(c)(iii) (a section within "Regulation Z," 12 C.F.R. 226), and 12 C.F.R. Part 226, App. H-3 ("model form"). These two regulatory enactments have not changed since the time of the RIC's execution (August 31, 1995). Neither the regulation nor the model form provide any further guidance—with any relevance to this case—than that already present on the face of § 1638(a)(2)(B)(iii). The regulation states:

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[1] 12 C.F.R. Part 226, Supp. I, § 226.18(c)(1) specifically allows creditors to provide an itemization as a matter of course, without notifying the consumer of the right to receive it.

> For each transaction, the creditor shall disclose the following information as applicable:
>
> ***
>
> (c) Itemization of amount financed. (1) A separate written itemization of the amount financed, including:
>
> ***
>
> (iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons.[2]

12 C.F.R. § 226.18(c)(iii) (1999). Model form H-3 appears as follows:

> Itemization of the Amount Financed of $ _____
> $ _____ Amount given to you directly
> $ _____ Amount paid on your account
>
> Amount paid to others on your behalf
> $ _____ to [public officials] [credit bureau] — [appraiser] [insurance company]
> $ _____ to [name of another creditor]
> $ _____ to [other]
> $ _____ Prepaid finance charge

These were the only relevant materials promulgated by the Federal Reserve Board ("FRB") (which is charged with elaborating on the TILA's text, *see* 15 U.S.C. § 1604) at the time the Greens entered the RIC. Nevertheless, some of Levis Motors's and Hancock's arguments rely on

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[2] The following payees may be described using generic or other general terms and need not be further identified: public officials or government agencies . . . [This footnote is a part of the quoted regulation.]

FRB interpretations proposed and issued *after* execution of the RIC. A description of these materials follows.

B

In December 1995, the FRB staff proposed an official staff interpretation of § 1638(a)(2)(B)(iii). *See* Truth in Lending, 60 Fed. Reg. 62764, 62765, 62769 (1995) (proposed Dec. 7, 1995). This proposed interpretation provides the following:

> *Creditor-imposed charges added to amounts paid to others.* A creditor that offers an item for sale in both cash and credit transactions sometimes adds an amount (often referred to as an "upcharge") to a fee charged to a consumer by a third party for a service (such as for a maintenance or service contract) that is payable in an equal amount in both types of transactions, and retains that amount. At its option, the creditor may list the total charge (including the portion retained by it) as an amount paid to others, or it may choose to reflect the amounts in the manner in which they were actually paid to or retained by the appropriate parties.

Truth in Lending, 60 Fed. Reg. at 62769 (emphasis indicated by underlining added). The FRB never adopted this proposed interpretation. Instead, the FRB promulgated a somewhat more restrictive interpretation in April 1996:

> *Charges added to amounts paid to others.* A sum is sometimes added to the amount of a fee charged to a consumer for a service provided by a third party (such as for an extended warranty or a service contract) that is payable in the same amount in comparable cash and credit transactions. In the credit

> transaction, the amount is retained by the creditor. Given the flexibility permitted in meeting the requirements of the amount financed itemization (see the commentary to § 226.18(c)), the creditor in such cases may reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor could add to the category "amount paid to others" language such as "(we may be retaining a portion of this amount)."

Truth in Lending, 61 Fed. Reg. 14952, 14956 (1996) (effective April 1, 1996) (referred to below as the "FRB official interpretation") (emphasis indicated by underlining added). The FRB's accompanying explanation explains why this officially adopted interpretation is more restrictive than its previously proposed counterpart:

> [The December, 1995 proposed interpretation] stated that a creditor could include in the "amount paid to others," any amount retained by the creditor without itemizing or noting this fact. Concern is raised about the appropriateness of such treatment under the TILA where a substantial portion of a fee categorized as "amounts paid to others," is in fact retained by the creditor. Accordingly, a sentence has been added to clarify that given the flexibility in itemizing the amount financed, creditors may reflect that they have retained a portion of the "amount paid to others" rather than disclosing the specific amount retained.

61 Fed. Reg. 14952, 14954 (1996). After the April 1996, adoption of the official interpretation,[3] a handful of dis-

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[3] Now codified at 12 C.F.R. Part 226, Supp. I, § 226.18(c)(1)(iii)-2 (1999).

trict courts (most within the state of Illinois) disagreed as to whether the FRB interpretation would allow creditors to lump the upcharge in with the fees paid to third parties—without informing the buyers that the creditor included an upcharge.[4] Subsequently, the Seventh Circuit settled the intra-circuit controversy by reading the FRB's interpretation as requiring creditors either to itemize the upcharge separately or to include some language indicating that it may have listed the upcharge and the actual amount paid to third parties as one numerical value. *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285-86 (7th Cir. 1997) (Posner, C.J.).

III

The Greens filed their TILA claims against Levis Motors and Hancock in May 1996.[5] The Greens filed

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[4] *See, e.g., Gibson v. Bob Watson Chevrolet-Geo, Inc.*, No. 95-C-6661, 1996 WL 316975 (N.D. Ill. June 10, 1996) (holding that defendant does not violate TILA when it failed to disclose existence of an upcharge), *rev'd*, 112 F.3d 283 (7th Cir. 1997); *Taylor v. Quality Hyundai, Inc.*, 932 F. Supp. 218 (N.D. Ill. 1996) (same), *aff'd in part and rev'd in part*, 150 F.3d 689 (7th Cir. 1998); *Abercrombie v. William Chevrolet/Geo Inc.*, No. 95-C-3119, 1996 WL 251435 (N.D. Ill. May 8, 1996) (same); *El-Mohammed v. Old Orchard Chevrolet-Geo, Inc.*, No. 96-C-3774, 1997 WL 106243 (N.D. Ill. Feb. 10, 1997) (same); *Bambilla v. Evanston Nissan, Inc.*, No. 94-C-6818, 1996 WL 284954 (N.D. Ill. May 21, 1996) (holding that defendant violated TILA by failing to note the existence of an upcharge); *Alexander v. Continental Motor Werks, Inc.*, 933 F. Supp. 715 (N.D. Ill. July 16, 1996) (same).

[5] The Greens filed several other claims, but only the TILA claims are before us on appeal.

their action as a putative class action, but the district court granted summary judgment to both Levis Motors and Hancock before reaching a decision as to class certification. In the claims asserted against Hancock, the district court issued summary judgment for Hancock based on a written opinion. The court also granted summary judgment in favor of Levis Motors based on oral conclusions stated during a hearing on the motion for summary judgment. In short, the district court first concluded that Hancock was not liable as an assignee of the RIC under 15 U.S.C.A. § 1641(a) (which governs assignee liability). Furthermore, the court also concluded that the FTC clause did not have any effect in the context of TILA claims asserted against an assignee. Finally, the court found that the TILA good faith safe harbor provision, 15 U.S.C.A. § 1640(f), shielded Levis Motors from liability for the alleged violations. The district court did not, however, decide whether Levis Motors's conduct would have constituted a TILA violation if the safe harbor provision did not apply.

IV

This court reviews a trial court's grant of summary judgment *de novo*. *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 431 (5th Cir. 1998). Summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

A

Levis Motors argues that, irrespective of whether it has technically violated the TILA, the good faith safe harbor

provision of that act, 15 U.S.C. § 1640(f), shields it from liability. Section 1640(f) states:

> No provision of this section . . . imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board . . ., notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

15 U.S.C.A. § 1640(f) (West 1998). The district court agreed with Levis Motors, reasoning that the car dealer could not be charged with a violation of the TILA when such a divisive split occurred in the (Illinois) district courts after the FRB issued its official interpretation.

(1)

The Greens first argue that the district court erred because the FRB did not propose the interpretation that prompted the disagreement among the courts until *after* the Greens and Levis Motors executed the RIC. Citing Fifth Circuit law, the Greens maintain that the safe harbor provided by § 1640(f) can only shield creditors who act in conformity with regulations or interpretations in existence at the time of the challenged disclosure. *See Jones v. Community Loan & Investment Corp. of Fulton County*, 544 F.2d 1228, 1232 (5th Cir. 1977); *McGowan v. Credit Ctr. of North Jackson, Inc.*, 546 F.2d 73, 77 (5th Cir. 1977). The Greens further note that Levis Motors does not claim to have relied on any conflicting authority existing before the Greens entered their RIC.

(2)

Levis Motors makes two main arguments in response to the Greens. First, Levis Motors argues that it did act in conformity with the statutory, regulatory, and commentary provisions existing at the time of the RIC's execution. Specifically, Levis Motors maintains that it acted in conformity with model form H-3 and Official Comments 18(c)-2 and 18(c)-3.[6] The district court did not, however, rely on this particular argument in making its decision.

In its second argument, Levis Motors puts forth, and attempts to bolster, the reasoning of the district court. According to that reasoning, Levis Motors acted in good faith conformity with the official FRB interpretation issued in April 1996. Although this interpretation was not adopted until after execution of the Greens contract, Levis Motors maintains that it must have been acting in good faith because multiple courts split over how to read that interpretation: roughly half of the courts ruled that the FRB interpretation allowed creditors to combine upcharges with amounts paid to third parties without indicating to buyers that they were doing so; the other half of the courts ruled that the buyers must be informed. Levis Motors argues that with half of the courts going one way, and half going the other way, it should be entitled to the good faith safe harbor. Because the FRB adopted its interpretation *after* execution of the Greens' RIC, Levis Motors necessarily argues that one need not actually *rely upon* a regulatory interpretation in order to act "in good faith in conformity with" that interpretation.

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[6] *See* 12 C.F.R. § 226, Supp. I, § 226.18(c)-2,3 (1999).

(3)

Levis Motors cannot overcome a serious obstacle to its good faith argument: Binding Fifth Circuit precedent holds that a party cannot act "in good faith in conformity with" a regulation or interpretation that does not exist at the time of the disputed act (or omission).[7] For example, in *Jones*, this court dealt with a TILA claim in which the lenders executed their loans prior to the date the FRB amended a particular regulation. "Since these two lenders could not have relied upon the amendatory regulation at the time their loans were transacted, [this court] held that they were barred from reliance upon Section 1640(f)'s exculpatory language." *McGowan*, 546 F.2d at 77 (discussing *Jones*, 544 F.2d at 1231).

Although Levis Motors holds the view that "*Jones* and *McGowan* are contrary to the plain language of § 1640(f),"[8] it does not provide any compelling argument for why those cases do not bind this court on the principle that a party cannot base its § 1640(f) defense on a regulation or interpretation that did not exist at the time of the transaction.[9]

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[7] The relevant Fifth Circuit cases (*Jones* and *McGowan*) deal with FRB regulations. However, Levis Motors has offered no good reason for treating official FRB interpretations differently from FRB regulations in this particular context.

[8] Levis Motors thinks that *Jones* and *McGowan* are contrary to the plain language of § 1640(f) because the words "in conformity with" should not be read to mean "in reliance upon." As the cases constitute precedent binding on our panel, however, this argument carries no weight.

[9] Hancock, which, as an assignee, has an interest in supporting Levis Motors's defenses, tries to help with an argument stating

(continued...)

In the alternative, Levis Motors argues that it acted in conformity with the model form (H-3) and FRB commentary existing at the time the parties executed the RIC. As is clear from the above description of model form H-3, however, that form does not indicate—in any way—that creditors can lump in upcharges with amounts paid to third parties without telling the buyers that they are doing so. Furthermore, the existing commentary that Levis Motors cites, 12 C.F.R. Part 226, Supp. I, § 226.18(c)-2,3, does not aid Levis Motors. For the sake of completeness, we set out the (minimally) relevant text of those comments:[10]

> *18(c) Itemization of amount financed.*
>
> ***
>
> 2. *Additional information.* Section 226.18(c) establishes only a minimum standard for the material to be included in the itemization of the amount financed. Creditors have considerable flexibility in revising or supplementing the information listed in § 226.18(c) and shown in model form H-3, although no changes are required.

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[9] (...continued)
that *Jones* and *McGowan* are no longer good law because Congress overruled those decisions when it simplified the TILA in 1980. We cannot see that the 1980 amendments changed § 1640(f) in any relevant respect. Furthermore, Hancock has not pointed to any relevant change in the regulations interpreting § 1640(f). In short, *Jones* and *McGowan* continue to bind us.

[10] Levis Motors's decision not to quote or focus in on any portion of these commentary paragraphs further highlights the weakness of the arguments that rely upon them.

***

3. *Amounts appropriate to more than one category.* When an amount may appropriately be placed in any of several categories and the creditor does not wish to revise the categories shown in § 226.18(c), the creditor has considerable flexibility in determining where to show the amount. For example:

• In a credit sale, the portion of the purchase price being financed by the creditor may be viewed as either an amount paid to the consumer or an amount paid on the consumer's account.

***

Neither the model form nor these FRB comments could be read as offsetting the plain language of § 1638(a)(2)(B)(iii) or 12 C.F.R. § 226.18(c)(iii). That plain language requires the itemization of amounts paid to third parties. By lumping the creditors' own charges in with the amounts actually paid to third parties, and failing to denote the conflation, the creditor fails to itemize or disclose (under any ordinary understanding of those terms) the "amount that is or will be paid to third persons." 15 U.S.C.A. § 1638(a)(2)(B)(iii).[11]

We will reverse the district court's decision to shield Levis Motors from TILA liability under § 1640(f). A complete reading of the statutory text, regulations, and commentary existing at the time of the relevant transaction mandates the conclusion that Levis Motors failed to con-

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[11] To comply with Form H-3, Levis Motors must have listed the *actual* amount paid to Louisiana next to the line designated "Amount Paid to Public Officials For License Fee." *See Gibson*, 112 F.3d at 286.

form in good faith with those authorities. Furthermore, Levis Motors cannot rely on subsequently issued FRB interpretations to support its § 1640(f) defense.

B

As noted above, after the district court found the § 1640(f) defense applicable, it did not go on to decide whether the RIC actually violated the TILA. Notwithstanding this fact, we have discretionary authority to decide the issue on this appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Creel v. Johnson*, 162 F.3d 385, 390 n.3 (5th Cir. 1998) (resolving an issue not argued to the district court "because uncertainty exists with respect to a pure question of law").

The issue here is one of pure law: Does a lender violate the TILA by retaining an upcharge and failing to denote this fact in its itemization of the amount paid to third parties. Additionally, and as the next section of our opinion indicates, "the proper resolution of this question [in the Greens' favor] is beyond any doubt." *Murray v. Anthony J. Bertucci Construction Co.*, 958 F.2d 127, 129 (5th Cir. 1992).

C

The Seventh Circuit has addressed this identical issue in *Gibson*, 112 F.3d at 284-86. That court concluded that

the retention of an undisclosed upcharge does violate the TILA. The reasoning in that opinion is convincing, and we will follow it.

The strongest argument against finding a violation is made by narrowly focusing on two sentences of the FRB's official interpretation (quoted in full ante at 7):

> Given the flexibility permitted in meeting the requirements of the amount financed itemization (see the commentary to § 226.18(c)), the creditor in such cases *may* reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor *could* add to the category "amount paid to others" language such as "(we may be retaining a portion of this amount)."

61 Fed. Reg. at 14956 (emphasis added). By focusing on the permissive words "may" and "could," some district courts (ruling before the Seventh Circuit's opinion in *Gibson*) read this interpretation to mean that a creditor could choose to disclose neither the actual amount of any upcharge nor the possible existence of an upcharge.

But read in the context of the interpretation's entire paragraph and the accompanying explanation (both are quoted in full ante at 7-8), it is clear that the inclusion of permissive terms was not intended to leave open the option of saying absolutely nothing at all about the existence of an upcharge. Instead, the FRB undoubtedly meant to give the creditors the option of either separately itemizing the actual amount paid to third parties or reporting one lump sum (made up of the actual amount paid to a third party and the upcharge) with an accompanying notation that the creditor might have included an upcharge.

This is the way that the Seventh Circuit has read the FRB's official interpretation. To read it any other way, the court said, would be to

> read the commentary to say: "You may conceal the fact that you are pocketing part of the fee that is ostensibly for a third party, but if you are a commercial saint and would prefer to tell the truth, you may do that too." So interpreted, however, the commentary not only would be preposterous; it would contradict the statute. The only sensible reading of the commentary is as authorizing the dealer to disclose only the fact that he is retaining a portion of the charge, rather than the exact amount of the retention. Even this is a considerable stretch of the statute; and it is as far as, if not farther than, the statute will stretch.

Gibson, 112 F.3d at 285-86.

In this case, Levis Motors neither itemized the upcharge separately nor indicated that an upcharge might be included. This failure constitutes a clear violation of the Truth In Lending Act.

D

We now consider the liability of Hancock as an assignee. Section 1641(a) governs the liability of assignees for the TILA violations of their assignors. That provision states, in relevant part:

> Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter . . . which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the

> face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned . . .

15 U.S.C.A. § 1641(a) (West 1998).

The Greens argue that this provision does not protect Hancock for two primary reasons. First the Greens argue that Levis Motors's TILA violation was apparent on the face of the RIC. Second, the Greens point to the FTC clause,[12] contained within the RIC, and argue that that provision makes Hancock liable to the same extent as Levis Motors, notwithstanding § 1641(a). We discuss these arguments in turn.

1

In the Greens' first argument, they note that Hancock is an experienced player in the credit industry; Hancock regularly purchases RICs from automobile dealers. Thus, according to the Greens, Hancock must have known, or at least should have known, that Levis Motors included an upcharge in the amount reported as "Amount Paid to Public Officials For License Fee." Furthermore, the

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[12] We repeat the clause for convenience:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Greens argue, the existence of this upcharge was apparent on the face of the RIC because Hancock could have looked at license fee tables that list the actual amount Louisiana would have charged the Greens. After noting this amount, the Greens continue, Hancock should have recognized the discrepancy with the amount listed in the Greens' RIC, thereby being alerted of the TILA violation. According to the Greens, the ready access to the tables makes the alleged TILA violation apparent on the face of the RIC.

In support of its argument, the Greens contrast their own case with *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998). In *Taylor*, the automobile dealer's RIC listed an amount paid to a third party for extended warranty coverage. This creditor also included an upcharge, which the Seventh Circuit concluded was not apparent on the face of the RIC. *Id.* at 694-95. The Greens argue that their case is different because the actual amount paid to the third party (Louisiana) is readily available through public documents. In contrast, the actual amount paid to third parties in *Taylor* (the party offering the extended warranty) may not have been as readily available to the assignee.

The district court disagreed with the Greens. That court held that the violation alleged by the Greens was not apparent on the face of the RIC. In following several other district court decisions, the district court stated that § 1641(a) establishes an objective test to determine the liability of assignees.[13] Thus, the court refused to

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[13] *See, e.g., Alexander v. Continental Motor Works, Inc.*, No. 97 C 5828, 1996 WL 79403, at *6 (N.D. Ill. Feb. 16, 1996) ("In gen-

(continued...)

consider Hancock's subjective experience and also refused to read § 1641(a) as requiring Hancock to look to the Louisiana tables.

The district court was correct. The only "assigned" document that the Greens point to is the RIC. Although Louisiana's fee tables may be available to the public, those tables do not constitute, according to § 1641(a)'s text, "documents assigned" to Hancock. A statement from the Seventh Circuit's *Taylor* opinion applies in this case as well:

> In effect, the rule for which the plaintiffs are arguing would impose a duty of inquiry on financial institutions that serve as assignees. Yet this is the very kind of duty that the statute precludes, by limiting the required inquiry to defects that can be ascertained from the face of the documents themselves.

Taylor, 150 F.3d at 694. The Eleventh Circuit has since agreed with *Taylor* and stated that "the plain language of the statute forbids us to [resort to evidence or documents extraneous to the disclosure statement]." *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 709 (11th Cir. 1998). The fact that *Taylor* and *Ellis* involved payments to third parties for extended warranty services—as opposed to state licensing fees—is a distinction that has no effect.

The two circuits that have addressed this issue and a common sense reading of § 1641(a) all point towards the

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[13] (...continued)
eral, courts addressing the issue of TILA assignee liability have found that § 1641(a) limits liability when there is no indication from the disclosure documents that liability may arise.").

conclusion that the alleged TILA violations were not apparent on the face of the Greens' contract. Thus, under § 1641(a), Hancock is not liable for Levis Motors's violations.

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Finally, the Greens invoke the FTC clause (quoted ante at footnote 12) of their RIC to argue that Hancock remains liable for Levis Motors's TILA violations regardless of § 1641(a)'s limitations. Because this clause is in a contract between two parties, the Greens argue, the court should give it its full effect. This argument becomes problematic, however, because giving this clause the full effect of its language would in every consumer credit contract negate the protections that § 1641(a) provides for the assignee; this is so because the FTC requires creditors to insert the FTC clause in all consumer credit contracts. *See* 16 C.F.R. § 433.2 (1999). This situation leaves our court with two options: (1) apply the clause so as to negate the effect of TILA's specific statutory provision; or (2) conclude that § 1641(a) overrides a clause (required by another agency) in a private contract. Both the Seventh and Eleventh Circuits have addressed this problem and both courts had little problem concluding that § 1641(a) overrides the contract clause. *Taylor*, 150 F.3d at 692-94; *Ellis*, 160 F.3d at 708-09.

The *Taylor* court noted that overriding the FTC clause in this context does not nullify it entirely. *Taylor*, 150 F.3d at 693. The clause still serves a very useful purpose for the plaintiffs. For example, "[i]f the cars they purchase turn out to be lemons and they assert a right to withhold payment against the sellers, they may also

assert the same right against the assignees." *Id.* Thus, § 1641(a) limits assignee liability on only one set of claims (i.e., the specified TILA claims). The *Taylor* court further reasoned that the FTC clause, "even though contained within the contract, was not the subject of bargaining between the parties, and indeed could not have been. It is part of the contract by force of law, and it must be read in light of other laws that modify its reach." *Id.*[14]

The Greens respond to this by pointing us to 15 U.S.C. § 1610(d):

> Except as specified in sections 1635, 1640, and 1666e of this title, this subchapter and the regulations issued thereunder do not effect the validity or enforceability of any contract or obligation under State or Federal law.

The Greens argue that to deny the FTC clause's application to TILA claims would be to invalidate (at least in part) the retail installment contract. Section 1610(d), according to the Greens, disclaims any intent to modify the reach of the included FTC clause.

To read § 1610(d) this way, however, would still produce an absurd result: the protections of § 1641(a) would never have any effect on consumer credit contracts. We fully recognize that the FTC's regulations do not neatly complement the TILA in this case. Yet, faced with the choice presented, we agree with the conclusion reached by the *Taylor* and *Ellis* courts, thereby choosing the lesser of two imperfect options.

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[14] The *Ellis* court agreed with the *Taylor* court on these points and reiterated its reasoning. *Ellis*, 160 F.3d at 709.

VI

In sum, we have concluded that the good faith safe harbor provision of the TILA does not shield Levis Motors from liability in this case. Furthermore, Levis Motors's RIC did violate the TILA. Therefore, we will remand for further proceedings with regard to Levis Motors. Finally, we will affirm the district court's grant of summary judgment in favor of Hancock. We will therefore remand for further proceedings not inconsistent with this opinion.

REVERSED in part,
AFFIRMED in part,
and REMANDED.

APPENDIX B

WILMORE GREEN, III AND MARSHA W. GREEN, et al VERSUS LEVIS MOTORS, INC., ET AL

CIVIL ACTION NUMBER 96-508-B-M1

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

994 F. Supp. 735; 1997 U.S. Dist. LEXIS 21971

July 25, 1997, Filed

DISPOSITION: [**1] Motion for summary judgment filed by Hancock GRANTED.

COUNSEL: For WILMORE GREEN, III, MARSHA W GREEN, plaintiffs: Daniel A. Edelman, Charles E. Petit, Edelman & Combs, Chicago, IL.

For WILMORE GREEN, III, MARSHA W GREEN, plaintiffs: Garth Jonathan Ridge, Baton Rouge, LA.

For LEVIS MOTORS, INC, defendant: Robert Lee Atkinson, Breazeale, Sachse & Wilson, Baton Rouge, LA.

For LEVIS MOTORS, INC, ROBERT J LEVIS, JOHN FOS, III, defendants: James Rodney Chastain, Jr, Christine Lipsey, Van R. Mayhall, Jr., Breazeale, Sachse & Wilson, Baton Rouge, LA.

For HANCOCK BANK OF LOUISIANA, defendant: Paul S. West, McGlinchey Stafford Lang, Baton Rouge, LA.

For HANCOCK BANK OF LOUISIANA, defendant: Anthony Joseph Rollo, Jr., Michael H. Rubin, Lauren L. Zimmermann, David S. Willenzik, McGlinchey Stafford Lang, New Orleans, LA.

JUDGES: FRANK J. POLOZOLA, UNITED STATES DISTRICT JUDGE.

OPINION BY: FRANK J. POLOZOLA

OPINION: [*736] RULING ON MOTION FOR SUMMARY JUDGMENT FILED BY HANCOCK BANK OF LOUISIANA

Wilmore and Marsha Green have filed a complaint against Hancock Bank of Louisiana ("Hancock") for violations of the Truth in Lending Act ("TILA"),[1] and for equitable restitution.[2] In response to [**2] the Green's complaint, Hancock has filed a motion for summary judgment. For reasons which follow, Hancock's motion for summary judgment is GRANTED.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material

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[1] *15 U.S.C. § 1601,* et seq.

[2] The Greens filed a motion to certify a class action lawsuit, but as of the date of this ruling, the Court has not ruled on this motion.

fact and that the moving party is entitled to judgment."[3] The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that [*737] party will bear the burden of proof at trial."[4] A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material [**3] fact,' but need not negate the elements of the nonmovant's case."[5] If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response."[6]

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial.[7] The nonmovant's [**4] burden may not be satisfied by conclusory allegations, unsubstantiated asser-

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[3] Fed.R.Civ.P. 56(c); *New York Life Ins. Co. v. Travelers Ins. Co., 92 F.3d 336, 338 (5th Cir. 1996); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 758 (5th Cir. 1996).*

[4] *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).* See also *Gunaca v. Texas, 65 F.3d 467, 469 (5th Cir. 1995).*

[5] *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994)* (en banc) (quoting *Celotex, 477 U.S. at 323-25, 106 S. Ct. at 2553).*

[6] *Little, 37 F.3d at 1075.*

[7] *Wallace v. Texas Tech Univ., 80 F.3d 1042, 1046-47 (5th Cir. 1996).*

tions, metaphysical doubt as to the facts, or a scintilla of evidence.[8] Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[9] The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[10] Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial.[11]

[**5] When affidavits are used to support or oppose a motion for summary judgment, the affidavits "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[12] Affidavits that are not based on personal knowledge or that are based merely on information and belief do not satisfy the requirements of Rule 56(e), and those portions of an affidavit that do not comply with Rule 56(e) are not entitled to any weight and cannot be considered in deciding a motion for summary

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[8] *Little, 37 F.3d at 1075; Wallace, 80 F.3d at 1047.*

[9] *Wallace, 80 F.3d at 1047.* Accord, *S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996).*

[10] *McCallum Highlands v. Washington Capital Dus, Inc., 66 F.3d 89, 92* (5th Cir.), as revised on denial of rehearing, *70 F.3d 26 (5th Cir. 1995).*

[11] *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).*

[12] Fed.R.Civ.P. 56(e); *Beijing Metals & Minerals Import / Export Corp. v. American Business Ctr., Inc., 993 F.2d 1178, 1182 (5th Cir. 1993).*

judgment.[13] Neither shall conclusory affidavits suffice to create or negate a genuine issue of fact.[14]

[**6] ANALYSIS

I. TILA Claims

The Greens have alleged several violations of TILA in their complaint. The following is an analysis of these claims.

(I)(A) "Effects of Alleged Understatement of "Finance Charge"

These claims center around the characterization of a $40 "license fee" charged by Levis Motors, Inc., d/b/a Levis Mitsubishi ("Levis"). The Greens claim the "license fee" was actually only $22, and that Levis violated TILA by including the difference of $18 in the "amount financed,"[15] instead of the "finance charge."[16] The following is a summary [*738] of the violations of TILA the Greens contend result from the alleged misclassification of the $18 difference:

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[13] *Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994).*

[14] *McCallum Highlands v. Washington Capital Dus, 66 F.3d at 92; Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203, 1207 (5th Cir. 1993); Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992).*

[15] See *15 U.S.C. § 1638*(a)(2) for definition of "amount financed."

[16] See *15 U.S.C. § 1605*(a) and 12 C.F.R. § 226.4(a) for definition of "finance charge."

1. Levis understated the "finance charge" disclosed to the Greens by $18 in violation of *15 U.S.C. § 1638*(a)(3) and 12 C.F.R. § 226.18(d).

2. By understating the "finance charge," Levis necessarily overstated the "amount financed" disclosed to the Greens by $18 in violation of *15 U.S.C. § 1638*(a)(2) and 12 C.F.R. § 226.18(b).

3. Because the "finance charge" and the "amount financed" were understated and overstated, respectively, Levis necessarily understated the "annual percentage [**7] rate" disclosed to the Greens in violation of *15 U.S.C. § 1638*(a)(4) and 12 C.F.R. § 226.18(e).

The Greens assert that Hancock is secondarily liable as an "assignee" under TILA. Levis is the "assignor" who assigns credit installment contracts to Hancock, and is primarily liable for the above alleged TILA violations. For the reasons set forth in White v. Diamond Motors, Inc.,[17] the Court finds the $40 fee charged by Levis meets the "comparable cash transaction" exception and, therefore, is not a "finance charge." Since the $40 "license fee" is not a "finance charge" as defined by TILA, the "finance charge," the "amount financed," and the "annual percentage rate" were accurately disclosed in accordance with TILA. The resolution of Levis's primary liability under TILA renders moot the question of Hancock's TILA liability as assignee [**8] of the retail installment contract between the Greens and Levis.[18] Therefore, since Levis is

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[17] *962 F. Supp. 867 (M.D. La. 1997).*

[18] See *McGee v. Kerr-Hickman Chrysler Plymouth, 93 F.3d 380, 385 n.9 (7th Cir. 1996).*

not liable under TILA, Hancock "is off the hook as well,"[19] and Hancock is entitled to summary judgment on these three TILA claims.[20]

(I)(B) Inaccurate Disclosure of "License Fee"

(I)(B)(1) Discussion of the Merits

The Greens assert an additional violation of TILA arguing the $40 "license fee" is an inaccurate disclosure, in violation of *15 U.S.C. § 1638*(a)(2)(B)(iii),[21] 12 C.F.R. § 226.18(c)(1)(iii),[22] and 12 C.F.R. § 226.18(c)

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[19] *McGee, 93 F.3d at 385 n.9.*

[20] For a full discussion of the above legal principles, see *White v. Diamond Motors, Inc., 962 F. Supp. 867 (M.D. La. 1997).*

[21] *15 U.S.C. § 1638*(a)(2)(B)(iii) provides as follows:

> In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, upon a written request, a written itemization of the amount financed. . . . Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed. For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items, to the extent applicable: . . . (iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person. . . . (Emphasis added.) [**10]

[22] 12 C.F.R. § 226.18(c)(1)(iii) states that "for each transaction, the creditor shall disclose . . . [a] separate written itemization of the amount financed, including . . . any amounts paid to other persons by the creditor on the consumer's behalf[, and] the creditor shall identify those persons."

(2),[23] because the "license fee" was actually $22. The difference of $18 retained by Levis is termed an "upcharge" under TILA. The issues before the Court are whether [**9] Levis must disclose the fact that an upcharge is included in the "license fee," whether Levis must disclose the specific amount of the upcharge of $18, whether Levis must disclose both, or whether Levis is required to disclose neither. Under the facts of this case, Levis has not disclosed either that an upcharge was retained by Levis or the specific amount of the upcharge.

Before the Court may discuss whether Hancock is secondarily liable for a violation [*739] of this provision of TILA, the Court must first discuss whether Levis is primarily liable. In analyzing Levis's responsibilities under *15 U.S.C. § 1638*(a)(2)(B)(iii), the Court must look to the wording of the statute, the regulations, the Official Staff Commentary of the Federal Reserve Board ("FRB") and the Federal Register. The Court will begin with an analysis of *15 U.S.C. § [**11] 1638*(a)(2)(B)(iii) which requires the creditor to provide a statement to the consumer of the consumer's right to obtain an "itemization of the amount financed." If the consumer so chooses, the creditor must disclose "each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to

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[23] Similar to *15 U.S.C. § 1638*(a)(2)(B), 12 C.F.R. § 226.18(c)(2) provides that the creditor need not disclose a separate written itemization of the amount financed if the creditor discloses to the consumer that the consumer has the right to obtain this separate written itemization, and the consumer declines to exercise this right.

the third person."[24] The applicable regulations merely restate the requirements set forth in the statute.[25]

Based on the statute and regulations, it seems clear that Levis (the creditor) must disclose that $22 was paid to the State of Louisiana for "license fees." However, FRB Official Staff Commentary on Regulation Z Truth in Lending, § 226.18, ¶ 18(c)(1)(iii)-2 (April 1, 1996) (the "amended commentary") complicates the above conclusion. In order to understand the amended commentary, both the commentary, as it was originally stated [**12] (the "original commentary") and the FRB's proffered reasons for changing the original commentary must be analyzed. The original commentary reads as follows:

> A creditor that offers an item for sale in both cash and credit transactions sometimes adds an amount (often referred to as an 'upcharge') to a fee charged to a consumer by a third party for a service (such as for a maintenance or service contract) that is payable in an equal amount in both types of transaction, and retains that amount. At its option, the creditor may list the total charge (including the portion retained by it) as an amount paid to others, or it may choose to reflect the amounts in the manner in which they were actually paid to or retained by the appropriate parties.[26]

Thus, under the original commentary, the FRB gave the creditor the option of either listing the total amount of the fee charged as an "amount paid to others" (i.e., list

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[24] *15 U.S.C. § 1638*(a)(2)(B)(iii).

[25] See 12 C.F.R. § 226.18(c)(1)(iii) and 12 C.F.R. § 226.18 (c)(2).

[26] Truth in Lending, *60 Fed. Reg. 62785* (Dec. 7, 1995).

the total $40 "license fee" as an amount paid to public officials), or the creditor may choose to disclose both the amount of the upcharge (in this case - $18) and the amount of the actual "license fee" (in this case - $22) separately.

[**13] The original commentary was amended based on comments received from the general public. In explaining the reasons for amending the original commentary, the FRB states as follows:

> For the most part, commenters agreed with the Board's proposed treatment. As proposed, the comment [originally] stated that a creditor could include in the 'amount paid to others,' any amount retained by the creditor without itemizing or noting this fact. Concern is raised about the appropriateness of such treatment under the TILA where a substantial portion of a fee categorized as 'amounts paid to others,' is in fact retained by the creditor. Accordingly, [the comment was changed, and] a sentence has been added to clarify that given the flexibility in itemizing the amount financed, creditors may reflect that they have retained a portion of the 'amount paid to others' rather than disclosing the specific amount retained.[27]

In summary, the FRB explained its reason for amending the original commentary was due to its "concern" about whether it was appropriate to sanction the practice of charging an upcharge to consumers without disclosing this fact. The FRB further explained the original [**14] commentary was changed to provide that, instead of dis-

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[27] Truth in Lending, *61 Fed. Reg. 14952, 14954* (April 4, 1996).

closing the specific amount of the upcharge, the creditor may disclose only the fact that there is an upcharge.

Thus, the FRB rewrote the original commentary as follows to reflect these concerns:

> [*740] Charges added to amounts paid to others.
>
> A sum is sometimes added to the amount of a fee charged to a consumer for a service provided by a third party (such as for an extended warranty or a service contract) that is payable in the same amount in comparable cash and credit transactions. In the credit transaction, the amount is retained by the creditor. Given the flexibility permitted in meeting the requirements of the amount financed itemization (see the commentary to section 226.18 (c)), the creditor in such cases may reflect that the creditor has retained a portion of the amount paid to others. For example, the creditor could add to the category "amount paid to others" [**15] language such as "(we may be retaining a portion of this amount)." (Emphasis added.)[28]

In summary, the amended commentary states, if the creditor adds an upcharge to an amount paid to a third party, the creditor may disclose the fact that the creditor has retained an upcharge, instead of disclosing the specific amount of the upcharge.

Summarizing the above, the statute *(15 U.S.C. § 1638*(a)(2)(B)(iii)) states a creditor must disclose each amount paid to third persons on the consumer's behalf,

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[28] FRB Official Staff Commentary on Regulation Z Truth in Lending, § 226.18, ¶ 18(c)(1)(iii)-2 (April 1, 1996) (the "amended commentary").

and the third persons must be identified or referenced. In more fully explaining what this specific statutory provision requires, the FRB proposed, in its original commentary, that, if the creditor charges an upcharge, the creditor need not disclose the fact that an upcharge was retained by the creditor.[29] The FRB elaborated that it changed the original commentary due [**16] to its concern about the appropriateness of creditors being allowed to charge an upcharge without disclosing this fact to the general public.[30] Accordingly, the original commentary was changed to take away the option of disclosing that the creditor has retained an upcharge, and instead, gave the creditor the choice of whether to disclose the specific amount of the upcharge.[31] Thus, the Court agrees with the characterization of the law as set forth in Alexander v. Continental Motor Werks, Inc.[32] The Alexander court states as follows:

> read in light of the FRB's supplementary comments [at Truth in Lending, *61 Fed. Reg. 14952, 14954* (April 4, 1996)] and in conjunction with the specific requirement set forth in Regulation Z [and the statute] that the creditor 'shall disclose . . . a written itemization of the amount financed including . . . (iii)

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[29] See Truth in Lending, *60 Fed. Reg. 62785* (Dec. 7, 1995) ("original commentary").

[30] See Truth in Lending, *61 Fed. Reg. 14952, 14954* (April 4, 1996).

[31] See FRB Official Staff Commentary on Regulation Z Truth in Lending, § 226.18, P 18(c)(1)(iii)-2 (April 1, 1996) ("amended commentary"). [**18]

[32] *Alexander v. Continental Motor Werks, Inc., 933 F. Supp. 715 (N.D. Ill. 1996)* (Kocoras, J.).

> any amounts paid to other persons by the creditor on the consumer's behalf,' an examination of the [amended] commentary reveals an intent not to relieve the dealer of the obligation to disclose the existence of an upcharge, but rather to relieve the dealer only of the obligation to disclose the amount of the upcharge.[33]

[**17] The Court finds further support for its interpretation of the law in that "such an interpretation, which benefits both consumers (by putting them on notice of the existence of an upcharge) and creditors (by preventing disclosure of actual cost), is wholly consistent with the fundamental proposition that any TILA disclosure must be accurate."[34] As stated by the court in Alexander,

> the interpretation propounded by the defendant, which gives the creditor the option of accurately disclosing its retention of a portion of the purchase price of the [license] or of inaccurately claiming that the entire amount of the purchase price of [*741] the [license] is being paid to a third party, would be to effectively authorize a deliberate, known misrepresentation under TILA.[35]

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[33] *Alexander, 933 F. Supp. at 718.*

[34] *Alexander, 933 F. Supp. at 718;* See *Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475, 479 (5th Cir. 1995)* ("The purpose of TILA is to protect the consumer from inaccurate and unfair credit practices, and to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. *15 U.S.C. § 1601*(a).")

[35] *Alexander, 933 F. Supp. at 718.*

Prior to the recent Seventh Circuit Court of Appeals decision in Gibson v. Bob Watson Chevrolet-Geo, Inc.,[36] there was a split in the district courts of the Seventh Circuit on the above issue.[37] Recently, the Seventh Circuit in Gibson reached the same conclusion as this Court by finding that "the only sensible reading of the [amended] commentary is as authorizing the dealer to disclose only the fact that he is retaining a portion of the [up] charge, rather than the [**19] exact amount of the retention."[38]

[**20] Having set forth the principles of law which must be applied herein, the Court now turns to an analysis of the facts of this case. In the retail installment con-

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[36] *112 F.3d 283 (7th Cir. 1997).*

[37] The courts agreeing with this Court's decision were as follows: *Ritter v. Durand Chevrolet, Inc., 932 F. Supp. 32 (D. Mass. 1996); Cirone-Shadow v. Union Nissan of Waukegan, 955 F. Supp. 938, 1997 WL 51678* (N.D. Ill. Feb. 5, 1997 (Kocoras, J.); *McPhan v. Geo R. Gibson Chevrolet, 1996 U.S. Dist. LEXIS 17678, 1996 WL 685449* (N.D. Ill. Nov. 25, 1996) (Nordberg, J.); *Lindsey v. Ed Johnson Oldsmobile, 1996 U.S. Dist. LEXIS 10236, 1996 WL 411336* (N.D. Ill. July 19, 1996) (Kocoras, J.); *Bambilla v. Evanston Nissan, Inc., 1996 U.S. Dist. LEXIS 7029, 1996 WL 284954* (N.D. Ill. May 21, 1996) (Leinenweber, J.).

The courts holding opposite of this Court were as follows: *Taylor v. Quality Hyundai, Inc., 932 F. Supp. 218 (N.D. Ill. 1996)* (Norgle, J.); *El-Mohammed v. Old Orchard Chevrolet-Geo, Inc., 1997 U.S. Dist. LEXIS 1578, 1997 WL 106243* (N.D. Ill. Feb. 10, 1997) (Holderman, J.); *Johnson v. Rohr-Ville Motors, Inc., 1996 U.S. Dist. LEXIS 11089, 1996 WL 447261* (N.D. Ill. Aug. 2, 1996) (Holderman, J.); *Gibson v. Bob Watson Chevrolet-Geo, Inc., 1996 U.S. Dist. LEXIS 7961, 1996 WL 316975* (N.D. Ill. June 10, 1996 (Gettleman, J.).

[38] *Gibson, 112 F.3d at 286.*

tract (between the Greens and Levis) assigned to Hancock, Levis discloses to the Greens that $40 is being paid to public officials for "license fees."[39] Levis does not disclose that it is retaining an upcharge of $18. Therefore, Levis may be liable for a violation of *15 U.S.C. § 1638*(a)(2)(B)(iii) of TILA.

Thus, based solely on the merits of this claim, the Court should deny Hancock's motion for summary judgment. However, even if Levis (as the creditor) may be liable for this alleged violation of TILA, Hancock is not liable unless the Court finds Hancock is liable as an assignee under *15 U.S.C. § 1641*(a), or unless the Court finds the language in the retail installment contract (between the Greens and Levis) assigned to Hancock subjects Hancock to liability. The Court now turns to [**21] a discussion of Hancock's potential responsibility for the alleged inaccurate disclosure.

(I)(B)(2) Discussion of Hancock's Liability as an Assignee

The Greens assert Hancock is liable under TILA for the failure to disclose the "license fee" included an upcharge based on two theories. First, the Greens contend Hancock is liable under *15 U.S.C. § 1641*(a) as an assignee of the retail installment contract. Second, the Greens assert the language in the retail installment contract assigned to Hancock subjects Hancock to TILA liability because it includes a Federal Trade Commission Holder in Due Course Notice ("FTC Holder Notice"). For reasons given

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[39] Def.'s Memo, Exhibit 1 (Copy of Retail Installment Contract).

in the Court's "Ruling on Motion for Summary Judgment Filed by Chrysler Financial Corp." in *Turner v. II Diamond Motors, Inc., 995 F. Supp. 644,* the Court holds Hancock is not liable for the failure to disclose the "upcharge" under *15 U.S.C. § 1641*(a) of TILA, and the Court finds the language in the FTC Holder Notice does not subject Hancock to liability under TILA.

II. Equitable Restitution Claims

In their complaint, the Greens assert a claim for "unjust enrichment" for the amount of the $18 upcharge built into the "license [**22] fee." The five requirements for a showing of "unjust enrichment" are: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the resulting impoverishment, (4) an absence of "justification" or "cause" for the enrichment and impoverishment, and (5) no other remedy [*742] at law.[40] However, "Courts may resort to equity only in cases of unjust enrichment for which there is no justification in law or contract."[41] In other words, "quasi-contractual remedies may not supplant a contract between the parties."[42] In addition, "[a] plaintiff can recover in unjust enrichment only if there is no other practical remedy

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[40] *Baker v. Maclay Properties Co., 648 So. 2d 888, 897 (La. 1995)* (citations omitted).

[41] *SMP Sales Mgt., Inc. v. Fleet Credit Corp., 960 F.2d 557, 560 (5th Cir. 1992)* (citations omitted).

[42] *Marple v. Kurzweg, 902 F.2d 397, 401 (5th Cir. 1990)* (citations omitted).

available by which the impoverishment might be or might reasonably have been avoided."[43]

[**23] The Greens argue the fact there is a contract between the parties does not bar an "unjust enrichment" action when the contract was entered into through misrepresentation. The Greens cite Carter in support of this argument. In Carter, there was no contract between the plaintiff and defendant.[44] In fact, the misrepresentation was made by a third party who fled the jurisdiction to avoid criminal prosecution. However, there is no language in Carter which supports the Greens's argument. Therefore, because there is a contract between the parties, the Court holds the Greens do not have a cause of action for "unjust enrichment." Accordingly, the Court grants Hancock's motion for summary judgment on this issue.

CONCLUSION

In conclusion, the Court grants Hancock's's motion for summary judgment on the following claims:

I. Hancock is liable as an assignee under *15 U.S.C. § 1641*(a) because Levis understated the "finance charge" disclosed to the Greens by [**24] $18 in violation of *15 U.S.C. § 1638*(a)(3) and 12 C.F.R. 226.18(d).

II. By understating the "finance charge," Hancock is liable as an assignee under *15 U.S.C. § 1641*(a) because

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[43] *Carter v. Flanagan, 455 So. 2d 689, 692 (La. App. 2d Cir. 1984).*

[44] See *Carter, 455 So. 2d at 694.*

Levis necessarily overstated the "amount financed" disclosed to the Greens by $18 in violation of *15 U.S.C. § 1638*(a)(2) and 12 C.F.R. § 226.18(b).

III. Since the "finance charge" and the "amount financed" were understated and overstated, respectively, Hancock is liable as an assignee under *15 U.S.C. § 1641*(a) because Levis necessarily understated the "annual percentage rate" disclosed to the Greens in violation of *15 U.S.C. § 1638*(a)(4) and 12 C.F.R. § 226.18(e).

IV. Hancock is liable as an assignee, both under *15 U.S.C. § 1641*(a) and the FTC Holder Notice, because Levis inaccurately disclosed the amount of the "license fee" in violation of *15 U.S.C. § 1638*(a)(2)(B)(iii), 12 C.F.R. § 226.18(c)(1)(iii), and 12 C.F.R. § 226.18(c)(2).

V. Hancock owes equitable restitution because Levis overcharged for a "license fee."

Therefore:

IT IS ORDERED that the motion for summary judgment filed by Hancock be and it is hereby GRANTED.

Baton Rouge, Louisiana, July 25, 1997.

FRANK J. [**25] POLOZOLA

UNITED STATES DISTRICT JUDGE

APPENDIX C

[Dated July 14, 1997]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FRANK J. TURNER, on behalf of himself and all others similarly situated — CIVIL ACTION

VERSUS — NUMBER 96-336-B-M1

II DIAMOND MOTORS, INC., ET AL

RULING ON NOTION FOR SUMMARY JUDGMENT FILED BY CHRYSLER FINANCIAL CORP.

This matter is before the Court on motion for summary judgment filed by Chrysler Financial Corporation ("CFC"). Frank J. Turner[1] ("Turner") has filed claims against CFC for alleged violations of the Truth in Lending Act ("TILA")[2] and for equitable restitution. In addition, Turner attempts to assert, in his memorandum in opposition to summary judgment, that CFC is in violation of the Louisiana Motor Vehicle Sales Finance Act

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[1] Turner has filed a motion to certify a class action lawsuit, but as of the date of this ruling, the Court has not ruled on this motion.

[2] 15 U.S.C. § 1601, et seq.

("LASFA").[3] Since the LASFA claim was not alleged in the complaint, the Court finds Turner has failed to properly plead the LASFA claim. Furthermore, for reasons which follow, CFC's motion for summary judgment is granted.

Turner contends that additional discovery is necessary in order to address CFC's motion for summary judgment.[4] Turner terms his opposition to CFC's motion for summary judgment, filed November 29, 1996, as a "preliminary response to be supplemented as necessary when the remaining discovery has been produced".[5] However, Turner has failed to comply with the provisions of Rule 56(f) of the Federal Rules of Civil Procedure.[6] CFC contends it has provided Turner with the additional information requested, and has inquired as to whether Turner needs any additional information.[7] CFC states that, as of January 17, 1997, Turner had not requested any additional information.[8] This motion has been pending for some time, and as of the date of this opinion, Turner has not supplemented his opposition to CFC's

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[3] La. R.S. 6:951, et seq.

[4] See "Plaintiff's Preliminary Opposition to Defendant's Motions for Summary Judgment" (Plaintiff's Memo") at pp. 1-2.

[5] Plaintiff's Memo at p. 2.

[6] See Kadair v. Sony Corp., 88 F.R.D. 280 (M.D. La. 1980), aff'd 694 F.2d 1017 (5th Cir. 1983).

[7] See CFC's "Reply Memorandum in Support of its Motion for Summary Judgment" ("CFC's Reply Memo") at p. 2 n.1; see also CFC'S Reply Memo, Exhibit 30 (December 18, 1996 Correspondence for W. Chad Stelly to Garth Ridge).

[8] CFC's Reply Memo at p. 2 n.1.

motion for summary judgment. Therefore, the Court will render a ruling on CFC's motion for summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment".[9] The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial".[10] A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact', but need not negate the elements of the nonmovant's case".[11] If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response".[12]

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[9] Fed.R.Civ.P. 56(c); New York Life Ins. Co. v. Travelers Ins. Co., 92 F.3d 336, 338 (5th Cir. 1996); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 758 (5th Cir. 1996).

[10] Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). See also Gunaca v. Texas, 65 F.3d 467, 469 (5th Cir. 1995).

[11] Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting Celotex, 477 U.S. at 323-25, 106 S.Ct. at 2553).

[12] Little, 37 F.3d at 1075.

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial.[13] The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence.[14] Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts".[15] The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts".[16] Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial.[17]

When affidavits are used to support or oppose a motion for summary judgment they "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is

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[13] Wallace v. Texas Tech Univ., 80 F.3d 1042, 1046-47 (5th Cir. 1996).

[14] Little, 37 F.3d at 1075; Wallace, 80 F.3d at 1047.

[15] Wallace, 80 F.3d at 1047, Accord, S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996).

[16] McCallum Highlands v. Washington Capital Dus, Inc., 66 F.3d 89, 92 (5th Cir.), as revised on denial of rehearing, 70 F.3d 26 (5th Cir. 1995).

[17] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

competent to testify to the matters stated therein".[18] Affidavits that are not based on personal knowledge or that are based merely on information and belief do not satisfy the requirements of Rule 56(e), and those portions of an affidavit that do not comply with Rule 56(e) are not entitled to any weight and cannot be considered in deciding a motion for summary Judgment.[19] Neither shall conclusory affidavits suffice to create or negate a genuine issue of fact.[20]

ANALYSIS

As stated above, Turner has asserted claims for various alleged violations of TILA[21] and for equitable restitution. In addition, in Turner's memorandum in opposition to summary judgment, Turner alleges CFC is in violation of LASFA".[22] The Court will address each of these claims separately.

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[18] Fed.R.Civ.P. 56(e); Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc., 993 F.2d 1178, 1182 (5th Cir. 1993).

[19] Richardson v. Oldham, 12 F.3d 1373, 1378-79 (5th Cir. 1994).

[20] McCallum Highlands v. Washington Capital Dus, 66 F.3d at 92; Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 7 F.3d 1203, 1207 (5th Cir. 1993); Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992).

[21] 15 U.S.C. § 1601, et seq.

[22] La. R.S. 6:951, et seq.

I. TILA CLAIMS

Turner has alleged several violations of TILA in his complaint which are based on the effect of II Diamond Motors, Inc.'s ("Diamond Mazda") alleged understatement of the "finance charge", alleged inaccurate disclosure of a "license fee", and alleged inaccurate disclosure of a "mortgage fee". Each of these claims will be discussed independently.

A. Effects of Alleged Understatement of "Finance Charge"

Turner challenges the $110 fee he was charged as a "license fee" by Diamond Mazda. Turner avers the "license fee" was actually only $36, and that Diamond Mazda violated TILA by including the difference of $74 in the "amount financed",[23] instead of the "finance charge".[24] Turner has asserted the following violations of TILA resulting from the alleged misclassification of the $74 difference:

1. Diamond Mazda understated the "finance charge" disclosed to Turner by $74 in violation of 15 U.S.C. § 1638(a) (3) and 12 C.F.R. 226.18(d).
2. By understating the "finance charge", Diamond Mazda necessarily overstated the "amount financed" disclosed to Turner by $74 in violation of 15 U.S.C. § 1638(a) (2) and 12 C.F.R. § 226.18(b).

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[23] See 15 U.S.C. § 1638(a) (2) for definition of "amount financed".

[24] See 15 U.S.C. § 1605(a) and 12 C.F.R. § 226.4(a) for definition of "finance charge".

3. Because the "finance charge" and the "amount financed" were understated and overstated, respectively, Diamond Mazda necessarily understated the "annual percentage rate" disclosed to Turner in violation of 15 U.S.C. § 1638(a) (4) and 12 C.F.R. § 226.18(e).

Turner argues CFC is secondarily liable as an "assignee" for the above alleged violations of TILA by Diamond Mazda. Diamond Mazda is the "assignor" who assigns credit installment contracts to CFC, and is primarily liable for the above alleged TILA violations.

For reasons set forth in White v. Diamond Motors, Inc.,[25] the Court finds the $110.00 fee charged by Diamond Mazda meets the "comparable cash transaction" exception, and therefore, is not a "finance charge". Since the $110 "license fee" is not a "finance charge" as defined by TILA, the "finance charge", the "amount financed", and the "annual percentage rate" were not inaccurately disclosed in violation of TILA. The resolution of Diamond Mazda's primary liability under TILA renders moot the question of CFC's TILA liability as assignee of the credit installment contracts.[26] Therefore, since Diamond Mazda is not liable under TILA, CFC "is off the hook as well",[27] and CFC is entitled to summary judgment on these three TILA claims.

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[25] 962 F.Supp. 867 (M.D. La. 1997).

[26] See McGee v. Kerr-Hickman Chrysler Plymouth, 93 F.3d 380, 385 n.9 (7th Cir. 1996).

[27] McGee, 93 F.3d at 385 n.9.

B. Inaccurate Disclosure of "License Fee"

1. Discussion of the Merits

Turner also claims the $110 "license fee" is an inaccurate disclosure, in violation of 15 U.S.C. § 1638(a) (2) (B) (iii),[28] 12 C.F.R. § 226.18(c) (1) (iii),[29] and 12 C.F.R. § 226.18(c) (2),[30] because the "license fee" was actually $36. Turner relies on a few cases which state that inac-

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[28] 15 U.S.C. § 1638(a) (2) (B) (iii) provides as follows:

> In conjunction with the disclosure of the amount financed, a creditor shall provide a statement of the consumer's right to obtain, *upon a written request*, a written itemization of the amount financed. . . . Upon receiving an affirmative indication, the creditor shall provide, at the time other disclosures are required to be furnished, a written itemization of the amount financed.
>
> For the purposes of this subparagraph, "itemization of the amount financed" means a disclosure of the following items to the extent applicable: . . . (iii) each amount that is or will be paid to third persons by the creditor on the consumer's behalf, together with an identification of or reference to the third person. . . . (Emphasis added).

[29] 12 C.F.R. § 226.18(c) (1) (iii) states that "[f]or each transaction, the creditor shall disclose . . . [a] separate written itemization of the amount financed, including . . . [a]ny amounts paid to other persons by the creditor on the consumer's behalf[, and] [t]he creditor shall identify those persons".

[30] Similar to 15 U.S.C. § 1638(a) (2) (B) (iii), 12 C.F.R. § 226.18(c) (2) provides that the creditor need not disclose a separate written itemization of the amount financed if the creditor discloses to the consumer that the consumer has the right to obtain this separate written itemization, and the consumer declines to exercise this right.

curate disclosures violate TILA.[31] Both the cited statute and regulations state the creditor need not provide a separate and written "itemization of the amount financed" as long an the creditor discloses to the consumer that the consumer has the right to request an itemization, and the consumer declines to exercise this right. In reviewing the evidence submitted in support of and in opposition to the motion for summary judgment, the Court finds the parties have not addressed whether Turner requested an itemization of the amount financed, including amounts paid to third parties. The parties have also not addressed whether it was disclosed to Turner that he had the right to request an itemization of the amount financed. Thus, there are genuine issues of material fact in dispute which preclude summary judgment on the issue of whether Diamond Mazda is primarily liable for this TILA violation.

However, even Diamond Mazda (as the creditor) may be primarily liable for this alleged violation of TILA, CFC is not liable unless the Court finds CFC is liable as an assignee under 15 U.S.C. § 1641 (a) or unless the Court finds that language in the retail installment contract between Turner and Diamond Mazda, which was assigned to CFC, subjects CFC to liability. The Court now turns to a discussion of CFC's potential responsibility under TILA for this alleged inaccurate disclosure.

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[31] Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475, 479 (5th Cir. 1995); Rivera v. Fair Chevrolet Geo Partnership, No. 3:95cv485 (PCD) (D.Conn. July 26, 1996) (Dorsey, C.J.) (slip op.); Ritter v. Durand Chevrolet, Inc., 932 F.Supp. 32, 35 (D.Mass. 1996).

2. Discussion of CFC's Liability as an Assignee

Turner asserts CFC is liable under TILA for the alleged inaccurate disclosure of the "license fee" based on two theories. First, Turner contends CFC is liable under 15 U.S.C. § 1641(a) as an assignee of the retail installment contract. Second, Turner asserts the language in the retail installment contract assigned to CFC subjects CFC to TILA liability.

a. 15 U.S.C. § 1641(a) - Liability of Assignee

15 U.S.C. § 1641(a) of TILA "establishes an objective test to determine the liability of an assignee and limits civil actions against an assignee of a creditor to those where the 'violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary'".[32] 15 U.S.C. § 1641(a) also provides the following:

> [f]or the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used in this subchapter.

"In general, courts addressing the issue of TILA assignee liability have found that § 1641(a) limits liability when there is no indication from the disclosure docu-

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[32] Smith v. Highland Bank, 915 F.Supp. 281, 290 (N.D. Ala. 1996) (quoting 15 U.S.C. § 1641(a)

ments that liability may arise".[33] The mere allegation that an assignee has general knowledge of the dealer's practice is not sufficient to find the assignee violated 15 U.S.C. § 1641(a).[34] Furthermore, if it is impossible to determine from the face of the disclosure documents who imposed the fees or required the services, an assignee is not liable under 15 U.S.C. § 1641(a).[35]

Turner relies on Guilfoy v. Suncoast Sav. & Loan Assn.[36] to support his argument that CFC is liable under TILA. In Guilfoy, the court held that all "TILA requires is that the source of the violation and the placement of certain charges in the wrong section of the disclosure statement must be apparent and clear from the face of the documentation".[37] The court in Guilfoy further stated it is not necessary for an assignee to have "actual notice of a violation" to be liable under 15 U.S.C. § 1641(a).[38] Finally, the Guilfoy court found:

> Section 1641 does not expressly require that the alleged violation be so plain as to necessarily put the

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[33] Alexander v. Continental Motor Werks, Inc., 1996 WL 79403 (N.D. Ill. Feb. 16, 1996) (citing Johnson v. Fleet Finance, Inc., 785 F.Supp. 1003 (S.D. Ga. 1992) and Brodo v. Bankers Trust Co., 847 F.Supp. 353 (E.D. Pa. 1994)

[34] Ritter v. Durand Chevrolet, 932 F.Supp. 32, 35 (D. Mass. 1996).

[35] Smith, 915 F.Supp. at 290.

[36] 94cv1500 (S.D. Fla. Oct. 13, 1995) (Marcus, J.) (Appendix "F" of Plaintiff's Memo).

[37] Guilfoy, 94cv1500 at 19.

[38] Guilfoy, 94cv1500 at 20.

> assignee on notice of its violative character. Rather, Congress placed certain limits upon a subsequent assignee's liability, and excused, for example, certain practices which the assignee could not have reasonably been apprised of. . . . The plain language of the statute indicates its breadth: 'apparent from the face of the documents' is an expansive concept; the phrase is not explicitly limited to the example set forth in the statute. Moreover, the legislative history indicates that as long as the source of the violation plainly can be gleaned from the documents, that is enough.[39]

Considering the above principles, the Court must determine whether it is "apparent" or whether it may be "gleaned" from the documents assigned to CFC that the $110 "license fee" was an inaccurate disclosure.[40] If the Court finds the alleged inaccurate disclosure was not "apparent" or could not be "gleaned" from the documents assigned to CFC, the Court must then determine whether Turner has shown that CFC had actual knowledge of the alleged inaccurate disclosure.

Turner argues that there is a genuine issue of material fact in dispute because CFC has merely asserted that the alleged inaccurate disclosure was not apparent from the face of the retail installment contract, and that CFC has not argued that the alleged inaccurate disclosure was not apparent from the other documents assigned to CFC. While it is true that CFC has only considered the retail installment contract, Turner does not point to any other

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[39] Guilfoy, 94cv1500 at 18-19.

[40] For purposes of this discussion, the Court will assume this disclosure violates TILA.

document assigned to CFC which makes it apparent there was a TILA violation. Turner has the burden of producing a document which, on its face, establishes an apparent violation of TILA; it is not CFC's burden to prove a negative by showing there was no violation in any and all documents in which CFC was assigned. Turner has produced no documents assigned to CFC in which there is a violation of TILA apparent on the face of the document.

In addition, Turner alleges "CFC prescribed the form [of the contract], knew of the alleged misrepresentation, and agreed to take a contract which on its face contained a misrepresentation".[41] Turner has cited no evidence supporting his assertion that CFC knew about alleged misrepresentation - that the "license fee" was $36 and not $110. "[T]he bare allegation of actual knowledge, unsupported by any factual assertions, fails to state a TILA claim" for assignee liability under § 1641(a).[42]

In conclusion, the source of this TILA violation is not "apparent" on the face of the documents assigned to CFC. In addition, Turner has produced no evidence that "the source of the violation plainly can be gleaned from the [any of the] documents . . .[43]." Furthermore, Turner has produced no evidence that CFC had actual knowledge of the alleged inaccurate disclosure of the $110 "license fee".

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[41] Plaintiff's Memo at p. 23.

[42] McPhan v. Geo R. Gibson Chevrolet, Inc., 1996 WL 685449 (N.D. Ill. Nov. 25, 1996) (citing Alexander, 1996 WL 79403 at 6).

[43] Guilfoy, 94cv1500 at 19.

Therefore, the Court holds that, even if the 110 "license fee" is an inaccurate disclosure under TILA, CFC is not liable as assignee under 15 U.S.C. § 1641(a).

b. FTC Holder Notice - Liability of CFC

In addition to 15 U.S.C. § 1641(a), Turner asserts CFC is liable due to the Federal Trade Commission Holder in Due Course Notice ("FTC Holder Notice") included in the retail installment contract between Turner and Diamond Mazda that was assigned to CFC".[44] There are many cases holding that the FTC Holder Notice subjects an assignee to liability for violations of TILA by the seller of goods;[45] there are also many cases holding the opposite.[46]

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[44] The FTC Holder Notice reads as follows:

> **ANY HOLDER OF THIS CONSUMER CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.** See Defendant's Memo, Exhibit 1 (Retail Installment Contract).

[45] See the following cases: Perry v. Household Retail Svcs., Inc., 953 F.Supp. 1370, 1376 (M.D. Ala. 1996); Cox v. First National Bank of Cincinnati, 633 F.Supp. 236, 239 (S.D. Ohio 1986); Fairman v. Schaumberg Toyota, Inc., 1996 WL 392224 at 7 (N.D. Ill. July 10, 1996).

[46] See the following cases: Alexander, 1996 WL 79403 at 8-9; Lindsey, 1996 WL 411336 at 7; Kinzel v. Southview Chevrolet Co., 892 F.Supp. 1211, 1217 (D. Minn. 1995); Vietnam Veterans

(continued...)

The Court believes the cases which find no liability based on the FTC Holder Notice are more persuasive. For the reasons assigned in Alexander v. Continental Motor Werks, Inc.,[47] the Court holds the FTC Holder Notice does not subject CFC to liability as an assignee for any alleged violations of TILA by Diamond Mazda.

c. Conclusion - Assignee Liability

In summary, the Court holds CFC is not liable as an assignee under 15 U.S.C. § 1641(a) for the alleged inaccurate disclosure of the "license fee". Furthermore, the Court holds the FTC Holder Notice in the retail installment contract does not make CFC subject to all claims and defenses under TILA which Turner may assert against Diamond Mazda. Therefore, CFC is not liable to Turner for the alleged TILA violation involving the alleged inaccurate disclosure of the "license fee".

C. Characterization of the Mortgage Fee

Turner alleges $10 of the $110 "license fee" is actually a mortgage fee, and the exclusion of the $10 mortgage fee from the "finance charge" is a violation of 12 C.F.R. § 226.4(e) (1). Turner argues TILA has been violated because the mortgage fee could be excluded from the "finance charge" only if accurately itemized and dis-

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[46] (...continued)
of America, Inc. v. Guerdon Industries, Inc., 644 F.Supp. 951, 965 (D. Del. 1986).

[47] 1996 WL 79403 at 8-9 (N.D. Ill. Feb 16, 1996).

closed.[48] CFC contends the mortgage fee is actually $5.00, and that the mortgage fee is not included in the $110 "license fee". CFC argues the $5.00 mortgage fee is actually absorbed by Diamond Mazda as a "cost of doing business", and is therefore, not a "finance charge".[49] Turner has now admitted "[t]his $5.00 filing fee was absorbed by Diamond Mazda an a "cost of doing business", and was not included within the $110.00 flat fee that Diamond Mazda charged Turner, nor was the $5.00 filing fee passed on to Turner as an additional fee or charge".[50] Since the parties agree on this issue, the Court holds the $5.00 mortgage fee to a "cost of doing business" which was properly excluded by Diamond Mazda from the "finance charge" pursuant to *Official Staff Commentary on Regulation Z Truth in Lending*, § 226.4, ¶ 4(a) (2)

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[48] 12 C.F.R. § 226.4(e) (1) states as follows:

> If itemized and disclosed, the following charges may be excluded from the finance charge: (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

[49] According to Board of Governors of the Federal Reserve System, *Official Staff Commentary on Regulation Z Truth in Lending*, § 226.4, ¶ 4(a) (2) (April 1, 1995).

> Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or service sold.

[50] Plaintiff's Preliminary Response to CFC's Statement of Material Facts at p. 4, para. 7.

(April 1, 1995).[51] Thus, CFC's motion for summary judgment is granted on this issue.

II. Equitable Restitution Claims

In his complaint, Turner asserts a claim for "equitable restitution" for the amount by which the actual amount paid to the State of Louisiana in license fees is exceeded by the $110 "license fee" charged by Diamond Mazda (the "overcharge"). Turner does not address the issue of "equitable restitution" in his memorandum in opposition to CFC's motion for summary judgment. The Court must assume that Turner is attempting to state a claim for "unjust enrichment". In order to establish a claim for "unjust enrichment", the plaintiff must prove (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment, and (5) there is no other remedy at law.[52] However, "[c]ourts may resort to equity only in cases of unjust enrichment for which there is no justification in law or contract".[53] In other words, "[q]uasi-contractual remedies may not supplant a

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[51] The official staff interpretations of Regulation Z, promulgated by the Federal Reserve Board, are binding on this Court unless demonstrably irrational. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565, 100 S.Ct. 790, 796, 63 L.Ed.2d 22 (1980).

[52] Baker v. Maclay Properties Co., 648 So. 2d. 888, 897 (La. 1995) (citations omitted).

[53] SMP Sales Mgmt., Inc. v. Fleet Credit Corp., 960 F.2d 557, 560 (5th Cir. 1992) (citations omitted).

contract between the parties".[54] In addition, "[a] plaintiff can recover in unjust enrichment only if there is no other practical remedy available by which the impoverishment might be or might reasonably have been avoided".[55]

First, the court finds Turner may not recover against CFC for unjust enrichment because there is a contract between the parties. Second, the evidence presented by CFC established that the services provided to Turner, for which he was charged $110, actually cost Diamond Mazda $114 to deliver. In other words, Turner was charged $110 for services which cost $114".[56] Turner has presented no evidence to contradict this assertion".[57] Because the services delivered cost $4 more than Turner

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[54] Marple v. Kurzweg, 902 F.2d 397, 401 (5th Cir. 1990) (citations omitted).

[55] Carter v. Flanagan, 455 So. 2d 689, 692 (La. App. 2d Cir. 1984).

[56] The services which cost $114 (for which Turner was charged $110) included license fees ($36), temporary tag fees ($4), certificate of title fees ($18.50), DPS handling charges ($5.50), notary fees ($15), and documentation fees ($35).

[57] See "Plaintiff's Preliminary Response to CFC's Statement of Material Facts" at No. 5. Turner denies the fact that Diamond Mazda could have charged him $114, instead of $110, for the services rendered by stating that "[t]he license fee was only $36. Diamond paid a total of $64 to public officials of the State of Louisiana. . . ." This is not responsive to whether Diamond Mazda actually incurred $114 in providing the above noted services to Turner. In summary, Turner does not dispute the fact that Diamond Mazda incurred expenses of $114 in providing the above noted services to Turner; Turner also does not dispute that he was charged $110 for this package of services.

was charged, Turner has failed to satisfy the element of impoverishment for an "unjust enrichment" claim. Therefore, based on the foregoing, the Court grants CFC's motion for summary judgment on Turner's claim for "unjust enrichment".

III. Louisiana Motor Vehicle Sales Finance Act ("LASFA")[58]

Turner argues, in his memorandum in opposition to summary judgment, that in addition to the $110 "license fee", a $189.50 consumer services fee was charged. Turner alleges the $189.50 consumer services fee includes some of the same fees charged in the $110 "license fee". Turner further alleges that LASFA allows a documentation fee of $35 to be charged for certain services enumerated,[59] and the $110 license fee and $189.50 consumer services, either separately or combined, exceeds this $35 limit. Turner did not plead this claim in his complaint or his amended complaint. In fact, Turner admits as such stating "[t]he effect of the excess of this fee over the maximum allowed is not before this Court at

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[58] La. R.S. 6:951, et seq.

[59] La. R.S. 6:956(E) (1) states the following:

> The seller is authorized in connection with any retail sale, including a retail installment transaction, to charge a fee for credit investigation, preparation of documents necessary to perfect or satisfy a lien upon the objects sold, and any other charges incidental to the said retail sale. The maximum amount permitted to be charged as fees shall be thirty-five dollars.

this time[,] except to the extent that it raises serious questions as to the treatment of the balance of $154.50 in relation to the other expenses which are supplied in the 'bundle' of services".[60] Therefore, since this claim under the LASFA is not before the Court, the Court will not address the merits of the claim, nor will the Court allow this claim to be considered as part of Turner's case.

CONCLUSION

In conclusion, the Court grants CFC's motion for summary judgment on the following claims:

I. CFC is liable as an assignee, under 15 U.S.C. § 1641(a) because Diamond Mazda understated the "finance charge" disclosed to Turner by $74 in violation of 15 U.S.C. § 1638 (a) (3) and 12 C.F.R. 226.18(d).

II. By understating the "finance charge", CFC is liable as an assignee under 15 U.S.C. § 1641(a) because Diamond Mazda necessarily overstated the "amount financed" disclosed to Turner by $74 in violation of 15 U.S.C. § 1638(a) (2) and 12 C. F.R. § 226.18(b).

III. Since the "finance charge" and the "amount financed" were understated and overstated, respectively, CFC is liable as an assignee under 15 U.S.C. § 1641(a) because Diamond Mazda necessarily understated the "annual percentage rate" disclosed to Turner in violation of 15 U.S.C. § 1638(a) (4) and 12 C.F.R. § 226.18(e).

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[60] Plaintiff's Memo at p. 12.

IV. CFC is liable as an assignee, both under 15 U.S.C. § 1641(a) and the FTC Holder Notice, because Diamond Mazda inaccurately disclosed the amount of the "license fee" in violation of 15 U.S.C. § 1638(a) (2) (B) (iii), 12 C.F.R. § 226.18(c) (1) (iii), and 12 C.F.R. § 226.18(c) (2).

V. CFC is liable as an assignee under 15 U.S.C. § 1641(a) because Diamond Mazda improperly excluded the alleged $10 mortgage fee from the "finance charge" because it was not separately itemized in violation of 12 C.F.R. § 226.4(e) (1).

VI. CFC owes equitable restitution because Diamond Mazda overcharged for a "license fee".

Finally, because Turner failed to plead a violation of LASFA in his complaint or his amended complaint, the Court finds this claim is not properly before the Court. The affect of this ruling is that all claims pending against CFC have been dismissed.

Therefore:

IT IS ORDERED that the motion for summary judgment filed by CFC be and it is hereby GRANTED. The Court will enter judgment at the conclusion of the case dismissing all claims against CFC with prejudice.

Baton Rouge, Louisiana. July 14, 1997.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

No. 99-493

In The

Supreme Court of the United States

WILMORE GREEN, III and MARSHA W. GREEN,

Petitioners,

vs.

LEVIS MOTORS, INC., doing business as Levis Mitsubishi; JOHN DOES, 1-10; HANCOCK BANK OF LOUISIANA; ABC INSURANCE; XYZ INSURANCE CO.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT HANCOCK BANK OF LOUISIANA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an assignee of a consumer credit contract, such as Respondent Hancock Bank of Louisiana ("Hancock"), can be held derivatively liable under TILA § 1641(a)[1] for a Truth in Lending disclosure violation that was not apparent on the face of the assigned documents?

2. Whether the inclusion of mandatory FTC Holder in Due Course Notice language in a retail installment sales contract has the effect of superseding the protections allowed to assignees under TILA § 1641(a)?

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[1] References to "TILA" and the "Act" refer to the Federal Truth in Lending Act, 15 U.S.C.A. §§ 1601, et seq. (West 1999). References to "Regulation Z" refer to Regulation Z of the Board of Governors of the Federal Reserve System, 12 C.F.R. §§ 226.1, et seq. (1999).

CORPORATE DISCLOSURE STATEMENT

Hancock Bank of Louisiana is wholly owned by its parent company, Hancock Holding Company.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. The Law That Applies In This Case Is Clear And Free From Ambiguity; Assignee Liability Under TILA § 1641(a) Is Limited To Violations Apparent On The Face Of The Assigned Documents.

An assignee of a consumer credit contract, such as Hancock, cannot be held derivatively liable under TILA § 1641(a) for Truth in Lending disclosure violations committed by the originating dealer/creditor unless the violations were apparent on the face of the assigned documents.

> **Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned . . .**

15 U.S.C.A. § 1641(a) (West 1999).

TILA 1641(a) was added by Congress under the Truth in Lending Simplification and Reform Act of 1980 (Act of March 31, 1980, Pub. L. No. 96-221, 1980 U.S.C.C.A.N. (94 Stat., 168-186)) (the "TIL Simplification Act") to overturn

a line of pre-simplification decisions, which held an originating motor vehicle dealer to be an arranger of credit under the transaction, with the bank or finance company purchasing the consumer's contract on an assignee basis being the true creditor. *See Meyers v. Clearview Dodge*, 384 F.Supp. 722, 725 (E.D. La. 1974), *aff'd in part, rev. in part*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977); *Cenance v. Bohn Ford*, 621 F.2d 130, 133 (5th Cir. 1980), *aff'd in part, rev. in part*, 452 U.S. 155 (1981). Congress effectively superseded this line of pre-simplification decisions by amending the definition of *"creditor"* under TILA § 1602(f) to provide that the originating dealer to whom a consumer credit contract is initially payable, is the originating creditor under the transaction, and the party solely responsible to make required Truth in Lending disclosures. 125 Cong. Rec. S. 108 (daily ed. May 1, 1979), at p. 9160; and Sen. Rep. No. 96-73 at 10 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 280, 287; *see also* Regulation Z § 226.2(a)(17); *see additionally Riviere v. Banner Chevrolet*, 184 F.3d 457, 461 (5th Cir. 1999). The assignee status of a bank or finance company purchasing a consumer credit contract from an originating dealer/creditor is further explained in the Federal Reserve Board's Official Staff Commentary to Regulation Z at ¶ 2(a)(17)(i).

Congress additionally added TILA § 1641(a) to provide that a bank or finance company purchasing a consumer credit contract on an indirect assignment basis may be held derivatively liable for Truth in Lending disclosure violations committed by the originating dealer/creditor only to the extent that the alleged violations were *"apparent on the face of the disclosure statement and other documents assigned."* (emphasis added) Sen. Rep.

No. 96-368, at 32-33 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 268.

When enacting TILA § 1641(a), Congress declined to impose an affirmative duty on an assignee to investigate or independently verify whether the information disclosed in the assigned documents was in fact correct and accurate. As pointed out by the United States Court of Appeals for the Seventh Circuit in *Taylor v. Quality Hyundai*, 150 F.3d 689, 694 (1998), *"[T]his is the very kind of duty that the statute precludes, by limiting the required inquiry to defects that can be ascertained from the face of the documents themselves.*** We hold that § 1641(a) does not impose a duty of additional inquiry on assignees."* (emphasis added). *See also Walker v. Wallace Auto Sales*, 155 F.3d 927, 935-36 (7th Cir. 1998); *Ellis v. General Motors Acceptance Corporation*, 160 F.3d 703, 709-710 (11th Cir. 1999).

In rejecting Petitioners' actual knowledge argument, the Fifth Circuit in this case, *Green v. Levis Motors*, 179 F.3d 286 (1999), followed the Seventh Circuit's prior holding in *Taylor, supra*, and the Eleventh Circuit's prior holding in *Ellis, supra*, and stated as follows:

> [The district] court held that the violation alleged by the Greens was not apparent on the face of the RIC. [retail installment contract] In following several other district court decisions, the district court stated that § 1641(a) establishes an objective test to determine the liability of assignees. Thus, the court refused to consider Hancock's substantive experience and also refused to read § 1641(a) as requiring Hancock to look to the Louisiana tables.

> The district court was correct. The only "assigned" document that the Greens point to is the RIC. Although Louisiana's fee tables may be available to the public, those tables do not constitute, according to § 1641(a)'s text, "documents assigned" to Hancock.

Green, 179 F.3d at 295.

Additional decisions properly limiting assignee liability under TILA § 1641(a) include: *Smith v. Highland Bank*, 915 F.Supp. 281, 290 (N.D. Ala. 1996), *aff'd*, 108 F.3d 1325 (11th Cir. 1997); *Johnson v. Fleet Finance, Inc.*, 785 F.Supp. 1003, 1011-12 (S.D. Ga. 1992); *Hoffman v. Grossinger Motor Corp.*, 1997 WL 793316, *9-10 (N.D. Ill. 1997).

II. The FTC Holder Rule Does Not Create Independent TIL Assignee Liability.

As a result of the Federal Trade Commission's Preservation of Consumer Claims Rule (16 C.F.R. § 433.1 et seq.) (1999) (the "Holder Rule"), every consumer retail installment sales contract is required to contain the following notice:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED THE AMOUNT PAID BY THE DEBTOR HEREUNDER.

This mandatory notice conflicts with TILA § 1641(a), which again limits an assignee's TILA derivative liability to only those disclosure violations that are apparent on the face of the assigned documents. The vast majority of courts that have considered this conflict, including the Fifth Circuit in *Green*, have held that the FTC Holder Rule, which is a regulation, does not have the effect of superseding TILA § 1641(a), which is a federal statute enacted by Congress. *Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc.*, 644 F.Supp. 951, 961-62 (D. Del. 1986); *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F.Supp. 1295, 1301 (D. Del. 1990); *Lindsey v. Ed Johnson Oldsmobile, Inc.*, 1996 WL 411336, *3 (N.D.Ill. 1996); *Kinzel v. Southview Chevrolet Co.*, 892 F.Supp. 1211, 1217 (D. Minn. 1995); *Cemail v. Viking Dodge, Inc.*, 982 F.Supp. 1296, 1300 (N.D.Ill. 1997); *Alexander v. Continental Motor Werks, Inc.*, 1996 WL 79403, *2 (N.D.Ill. 1996); *Hoffman*, 1997 WL 793316, *10-11 (N.D. Ill. 1997).

As stated by the district court in *Alexander, supra*:

> [T]he plaintiffs in effect argued that language required by the Federal Trade Commission

("FTC") in Retail Installment Contracts ("RIC") overrides section 1641(a) of the Truth in Lending Act ("TILA"), thus creating liability even where the alleged violation is not apparent on the face of the RICs. The standard contractual provision at issue provides that any holder is "subject to all claims and defenses" which the consumer has against the seller, limited to the amounts paid by the consumer. The language is required by FTC rules to be included in all consumer credit contracts.*** According to FTC commentary, the purpose of the FTC rule is to preserve a consumer's claim "to defeat or diminish the rights of a creditor to be paid" where the seller has failed to keep his side of the bargain.*** It is not the stated purpose of the rule to override the express language of federal statutes such as TILA, or to create claims for consumers that are otherwise precluded by statute.

In section 1641(a) of TILA, Congress expressly chose not to impose liability upon assignees who do not have notice of a TILA violation at the time of the assignment based on the documents assigned.*** The RIC language on which the plaintiffs here rely is present in every contract, and, accepting the plaintiffs' argument, would effectively impose liability upon an assignee regardless of whether the violation was apparent under section 1641(a). Such a result would be contrary to the congressional intent behind section 1641(a), effectively elevating an FTC regulation over the language of TILA and making that portion of TILA which pertains to assignee liability superfluous.

Alexander, 1996 WL 79403, *2.

This holding of *Alexander* was adopted by the district court in *Turner v. II Diamond Motors, Inc.*, U.S.D.C., M.D. La., Case No. 96-336-B-M1 (1997), *see* Petitioners' Appendix C, p. 15, and was again adopted by the same district judge in *Green*. *See* Petitioners' Appendix B, pp. 15-16. *Turner* and *Green* are related cases, and included similar claims brought before the same district judge, and involving the same counsel.

Petitioners' Holder Notice argument was uniformly rejected by the Seventh Circuit in *Taylor* and in *Walker*, by the Eleventh Circuit in *Ellis*, and again by the Fifth Circuit in *Green*. As stated by the Fifth Circuit:

> Finally, the Greens invoke the FTC clause *** of their RIC to argue that Hancock remains liable for Levis Motors' TILA violations regardless of § 1641(a)'s limitations. Because this clause is in a contract between two parties, the Greens argue, the court should give it its full effect. This argument becomes problematic, however, because giving this clause the full effect of its language would in every consumer credit contract negate the protections that § 1641(a) provides for the assignee; this is so because the FTC requires creditors to insert the FTC clause in all consumer credit contracts. See 16 C.F.R. § 433.2 (1999). This situation leaves our court with two options: (1) apply the clause so as to negate the effect of TILA's specific statutory provisions; or (2) conclude that § 1641(a) overrides a clause (required by another agency) in a private contract. Both the Seventh and Eleventh Circuits have addressed this problem and both courts had little problem concluding that § 1641(a) overrides the contract clause. *Taylor*, 150 F.3d at 692-694; *Ellis*, Id. at 708-09.

Green, 179 F.3d at 295-96; *see also Walker*, 155 F.3d at 934-35.

III. There Is No Split In The Circuits Requiring Review By This Court.

The three Federal Circuit Courts of Appeal that have considered the above issues – the Seventh Circuit in *Taylor* and in *Walker*, the Eleventh Circuit in *Ellis*, and the Fifth Circuit in *Green* – have uniformly held that: (a) an assignee of a consumer credit contract cannot be held derivatively liable under TILA § 1641(a) for Truth in Lending disclosure violations committed by the originating dealer/creditor that were not apparent on the face of the assigned documents; (b) an assignee has no affirmative duty to look beyond the assigned documents to inquire or verify whether the disclosed information is correct or accurate; and (c) inclusion of the mandatory FTC Holder Notice in a consumer credit contract does not have the effect of subjecting an assignee to greater liability for Truth in Lending disclosure violations committed by the originating dealer/creditor beyond those otherwise actionable under TILA § 1641(a).

As the Federal Circuit Courts of Appeal have consistently applied TILA § 1641(a) to the above effects, there is no compelling reason for the Supreme Court to grant a writ of *certiorari* in this case.

IV. There Is No Compelling Public Policy Reason For This Court To Grant A Writ Of *Certiorari*.

The issue before the Court – that being, the extent of an assignee's derivative liability for Truth in Lending disclosure violations committed by the originating dealer/creditor – was resolved by Congress under the 1980 TIL Simplification Act. After five years of hearings and debate, Congress decided as a matter of policy to limit an assignee's derivative TILA liability to only those disclosure violations that were apparent on the face of the assigned documents, without the assignee being obligated to conduct an additional inquiry or investigation to determine whether the disclosed information was correct or accurate. As this Court has repeatedly stated, it is not the proper role of the judiciary to second-guess policy decisions by the legislative branch of government, other than in limited circumstances when constitutionally guaranteed rights are in jeopardy. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 211 (1997); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952).

PERCEIVED MISSTATEMENTS OF LAW AND FACT

The following are perceived misstatements of law and fact contained in Petition For Writ of *Certiorari*.

V. Mischaracterization Of The Fifth Circuit's § 1641(a) Holding.

Misstatement: Petitioners mischaracterize the Fifth Circuit's TILA § 1641(a) holding in *Green*. As stated by Petitioners, "The Fifth Circuit found that it [the alleged overstatement of the license fee paid to the state] was not apparent on the face of the [assigned] document even if [though] Hancock (1) knew that the disclosure was false and (2) had ready access to the official license fee tables, which set the amount of the fee." (Petition, p. 5).

Correction: The Fifth Circuit did not find that Hancock independently knew or should have known of the alleged violation. To the contrary, the Fifth Circuit affirmed the district court's holding that Hancock was not required to look beyond the four corners of the assigned documents to determine if there was a violation. As stated by the Fifth Circuit: "The district court was correct. The only 'assigned' document that the Greens point to is the RIC. Although Louisiana's fee tables may be available to the public, those tables do not constitute, according to § 1641(a)'s text, 'documents assigned' to Hancock." *Green*, 179 F.3d at 295.

VI. There Is No Evidence That Hancock Independently Knew Of The Dealer Upcharge.

Misstatement: Petitioners insinuate that, irrespective of whether the alleged disclosure violation was apparent on the face of the assigned documents, Hancock independently knew that the amount of license fees that Levis charged Petitioners, and as disclosed in the Itemization of Amount Financed portion of the assigned contract, was in

excess of the amount actually paid to the state. (Petition, pp. 6, 8-12, 18).

Correction: There is no proof in the record of this case that Hancock independently knew that Levis was retaining a portion of the disclosed licensed fee in the form of a dealer upcharge. Petitioners failed to present evidence before the district court to support this contention. For this additional reason, the district court rejected Petitioners' actual knowledge argument, adopting the same court's prior holding in the related *Turner* case. *See* Petitioners' Appendix B, p. 16. As stated by the district court in *Turner*:

> [The plaintiff] has cited no evidence supporting his assertion that [the assignee] knew about [the] alleged misrepresentation – that the license fee was $36 and not $110. '[T]he bare allegation that actual knowledge, unsupported by any factual assertions, fails to state a TILA claim for assignee liability under § 1641(a).' McPhan v. Geo. R. Gibson Chevrolet, Inc., 1996 WL 685449 (N.D. Ill. Nov. 25, 1996) (citing Alexander, 1996 WL 79403 at 6). *** Furthermore, [the plaintiff] has produced no evidence that [the assignee] had actual knowledge of the alleged inaccurate disclosure of the $110 "license fee."

See Petitioners' Appendix C, p. 13.

Petitioners do not appeal the above holding to the Fifth Circuit, and are precluded from arguing before this Court that Hancock knew of the alleged violation.

VII. *Taylor* And *Ellis* May Not Be Distinguished.

Misstatement: Petitioners argue that the facts and circumstances of this case may be distinguished from those considered by the Seventh and Eleventh Circuits in *Taylor* and *Ellis*. (Petition, pp. 11-12).

Correction: The Fifth Circuit specifically rejected Petitioners' distinction argument, holding: "The fact that *Taylor* and *Ellis* involved payments to third parties for extended warranty services – as opposed to state licensing fees – is a distinction that has no effect." *Green*, 179 F.3d at 295.

VIII. Congress Rather Than The Fifth Circuit Limited The Ability Of Petitioners To Assert A Truth In Lending Claim Against Hancock.

Misstatement: Petitioners blame the Fifth Circuit for limiting their ability to assert a Truth in Lending claim against Hancock. (Petition, pp. 6, 12, 18).

Correction: Petitioners' assessment of blame is misplaced. As previously mentioned, Congress made a policy decision under the 1980 TIL Simplification Act to limit the liability of banks and finance companies purchasing consumer credit contracts on an indirect assignment basis, to only those disclosure violations committed by the originating dealer/creditor that are apparent on the face of the assigned document. The district court and the Fifth Circuit merely applied the law (TILA § 1641(a)) as written and intended by Congress.

IX. Truth In Lending Should Be Restrictively Rather Than Liberally Construed By The Courts.

Misstatement: Petitioners argue that the Fifth Circuit erred in failing to liberally construe TILA and Regulation Z in favor of borrowing consumers and against creditors, as required under prior decisions of this and other courts. (Petition, pp. 6, 12-13).

Correction: This statement totally ignores and directly contradicts the legislative history and stated congressional intent under the 1980 TIL Simplification Act.

Over the course of hearings on the need for Truth in Lending simplification and reform, Congress found that the tendency of certain courts to liberally construe and expand upon the disclosures requirements of the original (1968) Act and Regulation had resulted in disclosures of such length and complexity as to produce a form of *"informational overload"*, which actually had the counterproductive effect of inhibiting a consumer's ability to effectively comparison shop for credit. Sen. Rep. No. 96-73 at 2-3, 7 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 280, 280-282, 285; Sen. Rep. No. 95-720 at 2-3, 6 (1978); 123 Cong. Rec. S. 3875 (daily ed. Oct. 1, 1976), p. 34669; 125 Cong. Rec. S. 108 (daily ed. May 1, 1979), p. 9159.

As the three key components of the 1980 TIL Simplification Act, Congress expressly stated that it was amending TILA: (1) to simplify Truth in Lending by limiting required disclosures to only those essential items that Congress deemed to be truly meaningful to borrowing consumers when comparison shopping for credit; (2) to make compliance easier by directing the Federal Reserve Board to draft model forms and to issue an Official Staff

Commentary on which creditors could rely with immunity; and (3) to limit TILA § 1640(a)(2) civil money penalties "to only those disclosures which are of material importance in credit shopping," thereby eliminating litigation "based on purely technical violations of the act." Sen. Rep. No. 96-368 at 31 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 236, 267; see *also* 124 Cong. Rec. S. 1312 (daily ed. Apr. 20, 1977), pp. 11332-11333.

The importance of this expressed statement of congressional intent that the Act and Regulation Z be restrictively, rather than liberally construed by the courts, cannot be overstated. As noted by Justice Brennan in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980), "[J]udges are not accredited to supercede Congress or the appropriate agency by embellishing upon the regulatory scheme." Rather, "language of the legislative history [referring to the then pending 1980 TIL Simplification Act] evidences a decided preference for resolving interpretive issues by uniform administrative decision rather than piecemeal through litigation." *Id.* at 568. Therefore, "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not [demonstrably] irrational." *Id.*

Unfortunately, certain courts continue under the mistaken impression that, as a remedial statute, TILA must be liberally construed in favor of borrowing consumers and against creditors, totally ignoring Justice Brennan's directive in *Milhollin*, and further ignoring stated congressional intent under the 1980 TIL Simplification Act. Post simplification cases holding to this effect are wrong, and have resulted in the same types of judicial over

extensions of Truth in Lending that prompted Congress to simplify the Act in 1980.

X. TILA § 1640(a)(2) Civil Money Penalties May Not Be Awarded For Failure To Disclose A Dealer Upcharge; Recovery Limited To Proven TILA § 1640(a)(1) Actual Damages.

Misstatement: Petitioners overstate the importance of dealer upcharge disclosures, falsely implying that failure to separately itemize and disclose the existence of a dealer upcharge may result in the originating dealer/creditor and its assignee each being subject to TILA § 1640(a)(2) civil money penalties. (Petition, p. 14).

Correction: Failure to disclose the existence of a dealer upcharge is not the type of Truth in Lending disclosure violation that will give rise to an action for TILA § 1640(a)(2) civil money penalties. Civil money penalties are limited only to those specific disclosure violations listed in TILA § 1640(a)(3) that Congress deemed to be "of material importance in credit shopping." *See* Sen. Rep. No. 96-368 at 31 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 236, 267. Conspicuously absent from TILA § 1640(a)(3)'s list of actionable violations is a violation of the Itemization of Amount Financed disclosure requirements of TILA § 1638(a)(2)(B), as implemented under Regulation Z § 226.18(c)(1). Dealer upcharge disclosures exclusively fall within these two sections.

Contrary to what Petitioners may imply, an aggrieved consumer has no right to recover TILA

§ 1640(a)(2) civil money penalties as a result of a creditor's failure to individually itemize and disclose the existence of a dealer upcharge. An aggrieved consumer's right of recovery is limited to proven actual damages under TILA § 1640(a)(1). Truth in Lending actual damages are extremely difficult, if not impossible, to prove, and require proof of detrimental reliance and resulting monetary injury. *Adiel v. Chase Federal Savings and Loan Assoc.*, 630 F.Supp. 131 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (5th Cir. 1987). For this reason, Truth in Lending actual damage claims may not be certified as a class action. *See Castano v. American Tobacco*, 84 F.3d 734, 745 (5th Cir. 1996).

CONCLUSION

For the above reasons, the Petition For Writ of Certiorari should be denied by this Court.

Respectfully submitted this 22nd day of October, 1999.

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